described also stand for the notion that both overseas natural persons and overseas corporate defendants can be hauled into a different forum, under the right circumstances.

One of the major benefits of the ATS and similar statutes is that one could take advantage of these remedies simply by being in the United States. No matter how much more likely one might be to receive a favorable judgment in a different jurisdiction, such as the United Kingdom or Canada, this does not mean much without the ability to resolve the plaintiff personal jurisdiction question; the claimant must still establish their right to bring a claim in that particular forum. The practicalities and finances of how to facilitate moving to a foreign jurisdiction in order to obtain a judgment there to bring back to the United States is beyond the scope of this paper. Assuming this can be accomplished, though, there is still the question of how to have the judgment given the full force of the law back in the United States.

There is no federal statute governing the recognition or enforcement of foreign judgments, so following the shutdown of general federal common law,[112] the matter has been left to the states.[113] The origins of U.S. recognition of foreign judgments can be traced to a Supreme Court case called *Hilton v. Guyot*.[114] Though recognition of a French judgment was denied in this matter, *Hilton* is still notable for establishing the necessary prerequisites for a foreign judgment:

> where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal,

[112] Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").
[113] RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 481, cmt. a (AM. L. INST. 2018).
[114] Hilton v. Guyot, 159 U.S. 113 (1895).

> upon the mere assertion of the party that the judgment was erroneous in law or in fact.

What this boils down to is, as long as the foreign judgment comports with U.S. understandings of due process and fairness, and there are no special reasons why international comity between these nations should not be recognized, U.S. courts should acknowledge the judgment as valid and enforceable.

Though comity sounds like it should impart notions of full faith and credit, the Full Faith and Credit Clause of the U.S. Constitution[115] and the Full Faith and Credit Act[116] do not automatically require states to recognize and apply the judgments of foreign nations, even when another state as already decided to do so.[117] States have attempted to resolve this problem using two model pieces of legislation.

The first is the Uniform Enforcement of Foreign Judgments Act of 1964 (UEFJA), which provides adopting states with the statutory basis for affording foreign state court judgments full faith and credit.[118] As of 2022, every state (including Washington, D.C.) except for California and Vermont has adopted and enacted the UEFJA.[119] The second is the Uniform Foreign-Country Money Judgments Recognition Act of 2005 (UFMJRA).[120] It serves as a companion model act to the UEFJA, setting out model statutory provisions for the enforcement of foreign country judgments in a U.S. state court.[121] As of 2022, UFMJRA has been adopted by thirty states,

[115] U.S. CONST. art. IV, § 1.
[116] 28 U.S.C. § 1738.
[117] RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 481, note 9 (AM. L. INST. 2018).
[118] UNI. ENF'T FOREIGN JUDGMENTS ACT § 1 (UNIF. L. COMM'N 1964).
[119] *Id.* refs. & annos.
[120] UNI. FOREIGN-COUNTRY MONEY JUDGMENTS ACT (UNIF. L. COMM'N 2005).
[121] *Id.* § 3.

including Washington, D.C.[122] However, there are ten states or territories that, while they have not adopted the 2005 version of UFMJRA, they still have a prior version from 1964 enacted.[123]

Through the combined powers of UEFJA and UFMJRA, it is possible to bring a judgment obtained in a foreign jurisdiction back to the United States in order to perfect it. The point of utilizing these state statutes is to place an affirmative duty on the forum court—whatever state that court may be in—to recognize any foreign country claim that meets the standards, so that the judgement can be universally and equitably enforced across different fora.[124]

IV. CONCLUSION

Whatever one's feelings are on the ATS, it must be said that the statute has certainly had an interesting life; it first lived in relative obscurity before bursting onto the scene with hundreds of cases, then being slowly chipped away at until it no longer looks the same as it once did. With the Supreme Court having essentially closed the door on using the ATS to remediate violations outside of the United States, it is time to search for alternative avenues. Short of Congressional intervention, there is hardly a perfect solution that will solve all of the currently identified problems with ATS suits. However, by turning to foreign courts to obtain judgments on the merits and returning to state courts to perfect them, it is possible to avoid the worst of the problems, at least for now.

[122] *Id.* refs. & annos.
[123] UNI. FOREIGN-COUNTRY MONEY JUDGMENTS ACT (UNIF. L. COMM'N 1962). The ten states or territories that have adopted the 1962 version, but not the 2005 version, are: Alaska; Connecticut; Florida; Maryland; Massachusetts; Missouri; New Jersey; Ohio; Pennsylvania; and the U.S. Virgin Islands.
[124] *Id.* § 7(2), and cmt. 1.

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Writing Sample

I prepared this memo for my Investment Treaty Arbitration seminar, which I took in Fall 2022. We were provided with a hypothetical scenario (appended after the writing sample), and asked to address: (i) whether jurisdiction exists for claims against Romania under the Energy Charter Treaty (ECT); (ii) what jurisdictional defenses Romania is likely to raise; and (iii) how strong (or weak) those arguments are. No outside research was permitted, but we were free to rely on any of those materials that were discussed either in class or in the assigned readings. For the purposes of this assignment, we were told to ignore the *Slovak Republic v. Achmea* (Case C-284/16) decision—a 2018 Court of Justice of the European Union (CJEU) holding generally that arbitration clauses in intra-EU investment treaties are incompatible with EU law—and subsequent decisions on the matter, such as *Republic of Moldova v. Komstroy* (CJEU Case C-741/19) and *Green Power and SCE v. Spain*, Stockholm Chamber of Commerce Case No. V2016/135. Though this version incorporates general feedback from my professor, it is my original work product.

MEMORANDUM

To: Donald T. Smith
From: Rachel Bernard
Date: October 17, 2022
Re: Jurisdictional Questions in EasternSun Dispute

I. Questions Presented and Executive Summary

You first must establish that an eligible dispute exists for you to bring a claim to arbitration under the ICSID Convention (ICSID).[1] From there, you have asked us to analyze: (i) whether jurisdiction exists against Romania under the Energy Charter Treaty (ECT);[2] and (ii) what jurisdictional defenses Romania is likely to raise, and how strong (or weak) those arguments are.

EasternSun SRL's (EasternSun) treatment by Bihor County, a subdivision of Romania, has a strong case for a valid dispute under both the ECT and ICSID. The EasternSun plant (Plant) is definitely an investment under the ECT, and is very likely to be considered one under ICSID, too. Only Dutch Co. and EasternSun could be considered qualified investors under both treaties, so only they could file for arbitration. There are unlikely to be any temporal issues with the consent of either party to the dispute. Finally, while there are a handful of defenses Romania can raise, you are likely to successfully counter all of them. Thus, an ICSID tribunal very likely has jurisdiction.

II. Analysis

A. Does a valid dispute exist, allowing us to bring a claim to arbitration?

You must first establish that there is a dispute to serve as the basis for your claim. Since you are utilizing two treaties, you need to make sure there is a qualifying "dispute" within the terms of both the ECT and ICSID. ECT Art. 26(1)[3] only allows claims concerning violations of Part III of the ECT[4] (Arts. 10-17, discussing investment promotion and protection) to be submitted for dispute resolution. Whether through failing to protect the Plant from the March 2020 demonstrations, or through its unilateral June 2022 decree shuttering the Plant, Bihor County (and thus Romania) has arguably violated Art. 10(1) by failing to "create stable…and transparent conditions" or accord the investment fair and equal treatment,[5] as well as Art. 13's prohibition on

[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 Mar. 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID].
[2] Energy Charter Treaty, 17 Dec. 1994, 2080 U.N.T.S. 95 [hereinafter ECT].
[3] *Id.* at 121.
[4] *Id.*, at 109-14.
[5] *Id.*, at 109.

unlawful expropriation with regards to the latter event.[6] Additionally, to the extent that similarly situated Romanian or other international investments are not being subjected to the same treatment, this would be a violation of the national treatment and most-favored nation (MFN) clauses contained in Arts. 10(3) and (7).[7] You likely have an ECT-qualifying dispute.

ICSID Art. 25(1) extends the Center's jurisdiction to "any legal dispute arising directly out of an investment."[8] As just discussed, there is likely a legal dispute about the proper application of the ECT to the Plant. As discussed in further detail in Section II.B.1 of this memorandum, the Plant is considered an investment under both the ECT and ICSID. Thus, there is a qualifying dispute.

B. Is there jurisdiction for claims against Romania under the ECT?

Three jurisdictional hurdles must be satisfied for the arbitral tribunal to have proper jurisdiction over the claims: personal jurisdiction; subject-matter jurisdiction; and consent.

1. Subject-Matter Jurisdiction (*ratione materiae*)

Since ICSID operates in addition to the ECT, you need a qualifying "investment" under both treaties. ECT Art. 1(6) defines "investment" in extremely broad terms: it is "every kind of asset, owned or controlled directly or indirectly," followed by a non-exhaustive list of covered asset types.[9] Also, it must be associated with "an Economic Activity in the Energy Sector," which is broadly defined in Art. 1(5).[10] Though "associated with" is not clearly defined, an energy producing plant and the companies that directly fund that plant aren't likely to raise any issues. Finally, while the investment can have been made at any time, ECT protections only apply to matters affecting investments after the Effective Date of the Treaty.[11] Solar energy generation is not excluded from Art. 1(5),[12] and the Plant qualifies under Arts. 1(6)(a) and (b) (as property and a company, respectively), so you are able to satisfy the definition of "investment";[13] the temporal aspect is also satisfied, as the ECT went into force in 1998 for both Romania and the Netherlands (the U.S. isn't a party).[14]

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[6] ECT, *supra* note 2, 2080 U.N.T.S. at 111-12.
[7] *Id.* at 109-10.
[8] ICSID, *supra* note 1, 17 U.T.S. at 1280, 575 U.N.T.S. at 174.
[9] ECT, *supra* note 2, 2080 U.N.T.S. at 101-02.
[10] *Id.*
[11] *Id.* at 102.
[12] *Id.* at 105.
[13] *Id.*
[14] *Id.* at 96, 131-32. Art. 44 of the ECT says that the treaty enters into force ninety days after the thirtieth instrument of ratification, acceptance/approval, or accession is deposited, or, following such a time, ninety days after a State

ICSID doesn't explicitly define what an "investment" is, but various cases over the years have led to the development of a holistic set of "signals." To qualify, the investment must: (1) constitute a contribution over (2) a duration of time and (3) have an element of risk.[15] The contribution element is met through the construction of the solar facility, procuring equipment for the facility, and supplying the personnel. When you file, you will have been fulfilling the Concession Contract for almost six years. Historically, ICSID tribunals have viewed no more than two years as a minimum duration.[16] Finally, there is an inherent element of risk in the contract, as EasternSun might end up losing money. Occasionally, tribunals will also apply a fourth element—contribution to the development of the Host State.[17] However, given that this came out of a tender announcement by Bihor County (a subdivision of the State), this is likely to be met. You should have a qualifying investment.

2. Personal Jurisdiction (*ratione personae*)

You also must have a qualifying "investor" under both treaties to serve as the claimant. Importantly, "indirect investment" is covered under both treaties. As there are several possible qualifying investors, we address the standing of each of them for completeness. ECT Art. 1(7)(a) defines "investor" as (i) a natural person having citizenship, nationality, or permanent residency status in a Contracting Party (per its applicable law); and (ii) a company organized in accordance with applicable law in a Contracting Party.[18] You, Mr. Smith, cannot bring a claim because the U.S. is not an ECT Contracting Party. Your wife, Mrs. Smith, also cannot bring a claim because, as a Romanian national, doing so violates Art. 26(1), which only allows for settlement of disputes between a Contracting Party and an Investor of a <u>different</u> Contracting Party.[19]

For the same reason as yourself, U.S. Co. also cannot bring the claim. Dutch Co. can bring the claim because, per Art. 1(7)(a)(ii), it is a company organized in accordance with Dutch law, and the Netherlands is a Contracting Party.[20] EasternSun can also bring claim because it is

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deposits its instrument of ratification, acceptance/approval, or accession. Romania deposited its instrument on August 12, 1997, and the Netherlands deposited its instrument on December 16, 1997. *Id.* at 96. When the ECT entered into force on April 16, 1998, it thus entered into force for both countries.

[15] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 38 (July 31, 2001); Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award, ¶ 295 (Oct. 31, 2012).

[16] *Salini*, ICSID Case No. ARB/00/4.

[17] *Id.* ¶ 38.

[18] ECT, *supra* note 2, at 102.

[19] *Id.* at 121.

[20] *Id.* at 102.

organized under Romanian law. Unlike with Mrs. Smith, EasternSun would not violate Art. 26(1) because Art. 26(7) allows non-natural persons that have the nationality of the Contracting Party to the dispute (Romania) on the date of consent in Art. 26(4), but was, prior to the dispute, controlled by Investors of another Contracting Party (Netherlands, via Dutch Co.), to submit disputes for settlement under the allowable procedures.[21]

For natural persons, ICSID Art. 25(2)(a) requires that the claimant have the nationality of a Contracting State other than the one party to the dispute (here, Romania) on both the date of consent of the investor and the date of registration of the arbitration.[22] This can be the same date if registration is serving as your consent, or different dates if you send a "trigger letter" to Romania first, notifying it of your intent to bring a claim to arbitration. The claimant cannot also be a national of the State party to the dispute (no dual-nationality). Historically, Tribunals have deferred to national laws to define who qualifies as a national of a State.[23] You (Mr. Smith) would not satisfy the test. Though you are a U.S. national (and the U.S. is a party), and not a Romanian national, when you perfect your consent, U.S. Co. no longer owns any shares of EasternSun, so you have lost the necessary connection to the qualifying investment. Mrs. Smith is unable to be a complainant, as she is a Romanian national, and thus cannot bring a claim against Romania.

For legal persons, ICSID Art. 25(2)(b) requires that the complainant have the nationality of a Contracting State other than the one party to the dispute, or a local company controlled by foreign interests that the parties have agreed to treat as a national of another Contracting State.[24] Historically, ICSID tribunals have (implicitly) defined the nationality of a legal person using the seat of its incorporation.[25] Legal persons are also subject to the same temporal considerations as natural persons. Like yourself, U.S. Co. cannot bring the claim because, though it's incorporated in Delaware and thus a U.S. national, at the time your consent will be perfected, U.S. Co. no longer owns any shares of EasternSun. Dutch Co. can bring the claim because it is considered a Dutch national (being registered in the Netherlands, an ICSID Contracting State), is not a Romanian national, and, at the time of consent, owns 100% of the shares of EasternSun, connecting it to the investment made. EasternSun can also bring the claim, despite being a Romanian national.

[21] ECT, *supra* note 2, at 121-22.
[22] ICSID, *supra* note 1, 17 U.S.T. at 1280, 575 U.N.T.S. at 174.
[23] *See, e.g.*, Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Rom., ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008).
[24] ICSID, *supra* note 1, 17 U.S.T. at 1280, 575 U.N.T.S. at 174, 176.
[25] Tokios Tokelés v. Ukr., ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 42 (Apr. 29, 2004).

Qualifying ECT Art. 26(7) Investors (EasternSun) satisfy the ICSID Art. 25(2)(b) prior agreement standard for being treated as a "national of another Contracting State."[26] It has already been established that Dutch Co. meets the ECT definition of "investor." The dispute can be defined as starting in either March 2020 (with the violent demonstrations) or in June 2022 (with Bihor County's decree). Since Dutch Co. acquired EasternSun in January 2020, this element is likely also satisfied.

The ECT has been in force for Romania since 1998,[27] and ICSID since 1975.[28] There are no issues with whether a tribunal would have personal jurisdiction over Romania.

3. Consent

ECT Art. 26(3)(a) says, generally, Contracting Parties give unconditional consent for ICSID arbitration.[29] Romania has submitted an exception to this consent, per Arts. 26(2)(a) and (3)(b), and Annex ID(19), essentially requiring the complainant to face a "fork-in-the-road"—picking only one "Court of Justice" before which to bring the claim.[30] As long as you do not bring our claim before Romanian courts or another tribunal first, you should not run afoul of Romania's unconditional consent. Art. 26(4)(a)(i) says the investor must give its consent in writing for the dispute to be submitted to ICSID, if both Contracting Parties are ICSID parties (which is satisfied, whether Dutch Co. or EasternSun brings the claim).[31] ECT Art. 26(5)(a)(i) says these two consents are enough to satisfy written consent requirement in ICSID Chapter II.[32]

ICSID also looks for when both parties have consented to its specific jurisdiction.[33] Romania accepted ICSID jurisdiction in 1975, when ICSID entered into force for it.[34] Dutch Co. and EasternSun will both accept ICSID jurisdiction when they submit their intent to arbitrate to

[26] ECT, *supra* note 2, 2080 U.N.T.S. at 122 (referencing ICSID, *supra* note 1, 17 U.T.S. at 1280, 575 U.N.T.S. at 174, 176).
[27] *See supra* note 14.
[28] Romania deposited its instrument of ratification on September 12, 1975, and ICSID entered into force for Romania thirty days later on October 12, 1975, pursuant to ICSID Art. 68(2). *Database of ICSID Member States*. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES: WBG., https://icsid.worldbank.org/about/member-states/database-of-member-states (last visited Oct. 16, 2022); ICSID, *supra* note 1, 17 U.T.S. at 1296, 575 U.N.T.S. at 202.
[29] ECT, *supra* note 2, 2080 U.N.T.S. at 121.
[30] *Id.* at 121, 142.
[31] *Id.* at 121-22.
[32] *Id.* at 122; ICSID, *supra* note 1, 17 U.T.S. at 1280, 575 U.N.T.S. at 174.
[33] ICSID, *supra* note 1, 17 U.T.S. at 1280, 575 U.N.T.S. at 174, 176 (discussing the requirement for consent by both parties, and how both consents must be in effect when the request for arbitration is registered with the Secretary-General for the Centre).
[34] *See supra* note 28.

the Center, per ECT Art. 26(4)(i).[35] ICSID Art. 25(1) notes that, once given, no party may unilaterally withdraw its consent.[36] Subject to the defenses described in Section II.C, there should not be any issues with consent.

C. What jurisdictional defenses is Romania likely to raise?

One defense Romania can raise is that EasternSun's January 2020 ownership restructuring was done in bad faith in order to gain the benefits of the ECT (since U.S. Co., as a U.S. national, could not utilize those benefits). As this was done after the Romania First party had achieved a parliamentary majority in December 2019, and the Party had already expressed hostility to foreigners and renewable energy, it arguably was "reasonably foreseeable" that a dispute would arise.[37] However, this test is viewed as fairly extreme, and other tribunals have suggested that the test should really only look for whether the dispute already exists or the investment was made by way of corruption, fraud, or deceitful conduct.[38] None of these factors are present here, so this is not a particularly strong defense; even if the Tribunal follows the stricter standard, you will likely survive this objection because the majority of tribunals believe "treaty shopping" is permissible.[39]

Another possible defense is that Romania's consent is deficient, as the Concession Contract requires parties to utilize Romanian courts "without recourse to any foreign forum." There are a number of counterarguments you can make here. First, as previously noted, a party cannot withdraw consent to ICSID arbitration unilaterally once given,[40] and ICSID Art. 26 notes that exhaustion of local remedies can be a condition of consent, but does not replace such consent.[41] With this in mind, if the investor has reason to believe attempts to utilize local remedies would be fruitless, it's permissible to forgo them in favor of pursuing arbitration.[42] Additionally, ECT Art. 10(7) notes that investments get the better of national or MFN treatment.[43] If Romania allows recourse to foreign fora for others, then the MFN clause can potentially allow you to grab that, so

[35] ICSID, *supra* note 1, 17 U.T.S. at 1280, 1285, 575 U.N.T.S. at 174, 176, 182. ECT, *supra* note 2, 2080 U.N.T.S. 121-22.
[36] ICSID, *supra* note 1, 17 U.T.S. at 1280, 575 U.N.T.S. at 174.
[37] *Cf.* Philip Morris Asia Ltd. v. The Commonwealth of Austl., UNCITRAL, Perm. Ct. Arb. Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶ 585.
[38] Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶ 123 (June 18, 2010).
[39] Aguas del Tunari, S.A. v. Republic of Bol., ICSID Case No. ARB/02/3, Decision on Jurisdiction (Oct. 21, 2005).
[40] ICSID, *supra* note 1, 17 U.T.S. at 1280, 575 U.N.T.S. at 174.
[41] *Id.* at 1281, 575 U.N.T.S. at 176.
[42] BG Group PLC v. Arg., 572 U.S. 25, 30-31 (2014) (discussing the underlying UNCITRAL Tribunal decision).
[43] ECT, *supra* note 2, 2080 U.N.T.S. at 110.

long as you can establish the ECT's MFN clause is intended to cover dispute resolution.[44] Here, such an intention isn't clear. ECT Art. 10(7) requires national or MFN treatment for Investments and "their related activities including management, maintenance, use, enjoyment or disposal."[45] You can try to argue that dispute resolution is a "related activity" to the Investment, but that is an uphill battle, especially if the Tribunal uses the higher "no doubt" standard.[46] Further, under Romania's "fork-in-the-road clause," via ECT Art. 26(3)(b)(i), the investor is forced to pick between local remedies and international arbitration.[47] It would contravene the object and purpose of ICSID to have the Concession Contract force local remedies.[48] Finally, you can argue that the choice of forum clause in the Concession Contract only applies to claims arising under the contract itself, not to those disputes under the ECT. Taking all these counterarguments into consideration, you can likely defeat Romania's defense of deficient consent, but it could be difficult.

[44] *See*, *e.g.*, Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan. 25, 2000); Venez. US, S.R.L. (Barb.) v. Bolivarian Republic of Venez., Perm. Ct. Arb. Case No. 2013-34, Interim Award on Jurisdiction (July 26, 2016).
[45] ECT, *supra* note 2, 2080 U.N.T.S. at 110.
[46] Plama Consortium Ltd. v. Republic of Bulg., ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 223 (Feb. 8, 2005).
[47] ECT, *supra* note 2, 2080 U.N.T.S. at 121. *See also supra* note 30 and accompanying text.
[48] *See Tokios Tokelés*, ¶ 52 (holding that the object and purpose of ICSID is to expand protections, so tribunals are generally hesitant to adopt interpretations that would restrict protections or jurisdiction).

Practical Exercises – Fall 2022

You just received a phone call from Donald T. Smith, who is seeking your assistance with the following problem.

Mr. Smith, an American citizen, is the 70% shareholder of U.S. Co., a diversified company incorporated in Delaware. Melania Smith, his wife and a Romanian national, owns the other 30%. U.S. Co. is the 100% shareholder of Dutch Co., a company registered in the Netherlands. Dutch Co. has been the owner of EasternSun SRL, a company registered in Romania, since acquiring 100% of its shares from U.S. Co. in January 2020.

In July 2015, the National Gazette of Romania published the following tender announcement on behalf of Bihor County, Romania:

> *At the insistence of the European Union, and without prejudice to the noble history of coal production in Bihor County, the County announces a tender for the construction of a solar facility in Oradea, to be built and operated by the winning bidder for a guaranteed term of approximately 20 years. The following conditions shall apply:*
>
> - *The winning bidder shall be experienced in renewable energy projects;*
> - *The installed solar capacity shall be 500MW;*
> - *The plant shall be constructed in Oradea, Bihor County;*
> - *All Romanian laws shall be respected;*
> - *Key equipment shall be procured from within the European Union wherever practicable;*
> - *The winning bidder shall obtain an IRR of 15%;*
> - *The terms of the Solar Energy Act (2015) shall apply to the concession for its term;*
> - *The concession contract shall be governed by Romanian law and any disputes will be resolved in the Romanian courts without recourse to any foreign forum.*

The Solar Energy Act (2015), as referred to above, provided for preferential feed-in tariffs (***FITs***) for electricity supplied to the national grid by solar generation.

In January 2016, U.S. Co. – which, though primarily an alcoholic beverage company, also manages biomass energy facilities – tendered for the project. Two other companies also tendered.

On 4 July 2016, Bihor County awarded the concession contract to U.S. Co. It was agreed that the contracting parties would be Bihor County and EasternSun SRL. Their representatives proceeded to negotiate a contract containing the terms specified in the tender announcement.

On 15 December 2016, that agreement (the ***Concession Contract***) was signed. Beneath the signature lines, the word "Approved" appeared, followed by the signature and seal of the Energy Minister of Romania.

Construction of the new solar facility (the ***plant***) promptly commenced. It was completed and entered into service on 1 January 2019. The total construction cost was US$ 200 m.

In early 2019, a new right-wing political party called Romania First was founded by Lee Orbanescu, a former Uber driver. The party's platform was generally hostile to foreigners and to Brussels. Among other things, the platform called for the reinvigoration of the coal industry – historically a major force in the Romanian economy – and the elimination of "tree hugger" environmental policies that were said to have devastated the industry.

By the summer of 2019, advances in solar panel technology had radically reduced panel prices on the international market. The plant enjoyed a very profitable year, earning US$ 250 m in revenue and incurring just US$ 50 m in operating costs, largely by sourcing new and replacement panels from large manufacturers in China, Canada, South Korea and the United States.

In the national elections held in December 2019, Romania First achieved a parliamentary majority and formed a government with Orbanescu at its head. The party's margin of victory in historic coal mining districts, including Bihor County, was nearly 90%.

In January 2020, with advance notice to Bihor County, Dutch Co. acquired 100% of EasternSun SRL from U.S. Co.

In February 2020, the Romanian government (i) repealed the Solar Energy Act and (ii) decreed that all renewable energy plants in the country were required to convert to coal-fired generation, or shut down, by 1 January 2023. This was in furtherance of the governing party's "Coal First" policy.

Spontaneous demonstrations in support of the Romania First party broke out in March 2020, in the western counties in particular. Maskless despite the raging pandemic, but carrying flags and wearing Coal First caps, party supporters demonstrated for about three hours at the plant. The Managing Director of EasternSun SRL, Mihai ("Mike") Pencecu, repeatedly called the police to ask for help, but no officers arrived.

Four days later, Prime Minister Orbanescu held a rally in Oradea. The security forces warned the Prime Minister that many members of the audience were armed, but he decided to proceed, saying that they were "his people" and would not harm him. In a fiery speech, the Prime Minister railed against Brussels, foreigners and "tree huggers." He told the crowd that they should march to the EasternSun plant and "stop the steal" of good coal mining jobs. Led by the Prime Minister's former boxing instructor, Iosef ("Big Joe") Manchinescu, the mob invaded the plant, causing tremendous damage and badly injuring two employees. Mr. Pencecu again repeatedly called the police, but he was told that all officers were busy countering demonstrations in other parts of the city.

In June 2022, the government of Bihor County issued a decree confirming that the EasternSun plant would be shuttered on 1 January 2023. The government made the following statement:

> *The people of Bihor County have been victimized by Radical Left foreigners for too long. U.S. Co. and its affiliates have been charging exorbitant prices and relying on equipment from Red China. Having failed to convert the plant to run on high-quality Romanian coal, the foreigners will trouble us no longer after the end of this year. Romania First! Everyone else a very distant second!*

Mr. Smith has told you that U.S. Co., Dutch Co. and EasternSun SRL were not in breach of any of the terms of the Concession Agreement. He thinks that the courts in Romania will be biased against him and has therefore instructed you to initiate arbitration under the Energy Charter Treaty, or a bilateral investment treaty, against Romania.

Practical Exercises 1 & 2

1. Prepare a client memo to Mr. Smith addressing: (*i*) whether jurisdiction exists for claims against Romania under the Energy Charter Treaty (***ECT***); (*ii*) what jurisdictional defenses Romania is likely to raise; and (iii) how strong (or weak) those arguments are. No more than 5 pages.

2. Prepare a 5-page advice memorandum to Mr. Smith explaining:

   (a) under the ECT: (*i*) what substantive claims Dutch Co. or its affiliates may have against Romania; (*ii*) the likelihood of success of those claims; and (*iii*) any merits defenses that Romania may raise; and

   (b) the advantages and disadvantages of bringing a claim on behalf of a different party under the U.S.–Romania BIT, instead of or in addition to the claim in 2(a), above.

Practical Exercise 3

3. Draft a 5-page damages section of a merits memorial, pleading claims on the following bases:

   (a) "Lost profits" damages; and

   (b) Any other available damages claim or other form of relief.

N.B.: Please note your name in the upper right-hand corner of the first page of each assignment. All papers to be at least 1.5 space, single-sided and 12-point typeface or greater with 1-inch margins. Page limits must be respected, and a deduction will be made for papers that are more than 5 pages long or that do not respect the formatting rules above.

Applicant Details

First Name	**Jonathan**
Last Name	**Bertulis-Fernandes**
Citizenship Status	**U. S. Citizen**
Email Address	**bertulij@bc.edu**
Address	**Address** Street **36 Brookside Avenue #3** City **Boston** State/Territory **Massachusetts** Zip **02130** Country **United States**
Contact Phone Number	**6513837807**

Applicant Education

BA/BS From	**University of St. Andrews**
Date of BA/BS	**June 2015**
JD/LLB From	**Boston College Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=12201&yr=2011**
Date of JD/LLB	**May 31, 2024**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Boston College Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Foundation; The Appellate Project**

Recommenders

Romano, Nathaniel
romanone@bc.edu
Chirba, MaryAnn
maryann.chirba@bc.edu
781-697-2233
Parikh, Reena
clerkship@bc.edu
Bilder, Mary
bilder@bc.edu
617-552-0648

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jonathan Bertulis-Fernandes
36 Brookside Avenue #3
Boston, MA 02130

06/11/2023

The Honorable Juan Sanchez
United States District Court, Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, Pennsylvania 19106-1797

Dear Judge Sanchez:

I am a rising third-year law student and Public Service Scholar at Boston College Law School, where I am also Editor in Chief of the *Boston College Law Review*. I am writing to apply for a clerkship in your chambers for the 2024-25 term, where I would be thrilled to have the opportunity to lay the foundation for my future career as an advocate.

Throughout my life, I have been driven by a central commitment to public service: whether co-founding a charity in London that saved a vital community resource in the U.K.'s most impoverished borough or expanding the provision of essential legal services that reached more than 100,000 New Yorkers each year. I have served in elected office and worked for a former U.S. President, a U.S. Senator, and for the U.K. Government. At the same time, my first-hand experience as a second-generation immigrant and as someone with a disability affords me further unique perspectives on how the law impacts individuals and society.

In law school, I have seized every available opportunity to develop my research, writing, and leadership skills. I am a research assistant in the area of administrative law and serve as Co-President of the South Asian Law Students Association. During my 2L year, I have also represented clients as a student attorney in the Civil Rights Clinic, where I brought a class action suit against the Massachusetts Department of Correction.

I would greatly appreciate the opportunity to discuss my interests and qualifications with you in further detail. Enclosed, please find my application materials, including my resume, writing sample, law school transcript (top 5% in class), and undergraduate transcript. Separately, please also find letters of recommendation from Professors Mary Bilder, Nathaniel Romano, Mary Ann Chirba, and Reena Parikh. Please feel free to contact me at (651) 383-7807 or by email at bertulij@bc.edu if you require any further information. Thank you for your consideration.

Respectfully,

Jonathan Bertulis-Fernandes

Enclosures

Jonathan Bertulis-Fernandes

36 Brookside Avenue #3, Boston, MA 02130
bertulij@bc.edu - (651) 383-7807 – *He/Him/His*

EDUCATION

Boston College Law School Newton, MA
Candidate for Juris Doctor May 2024
GPA: 3.936/4.00 (top 5% in class)
Honors: Boston College Law Review, Editor in Chief (2023-24); Public Service Scholar (one of three in class of 350); Academic Success Program Peer Coach (2022-23); Research assistant to Prof. Bijal Shah (2023-).
Activities: South Asian Law Students Assn., Co-President.; Disability Law Students Assn.; Public Interest Law Fdn.

Emory University Atlanta, GA
Non-degree scholarship program August 2015 – July 2016
GPA: 4.0/4.0
Honors: Robert T. Jones Memorial Scholarship (awarded to four top graduating students from St Andrews).

University of St Andrews Scotland, U.K.
Master of Arts (with Honours), International Relations & Social Anthropology September 2011 – June 2015
Honors: First Class Honours (highest degree classification); Three Deans' List Citations; Nisbet Prize for International Relations (top performance in class of 330).
Study Abroad: Hong Kong University (2013) and Københavns Universitet (2014).

PROFESSIONAL EXPERIENCE

ACLU of Massachusetts Boston, MA
Incoming Summer Legal Intern Summer 2023

Boston College Law School, Civil Rights Clinic Newton, MA
SJC Rule 3:03 Certified Student Attorney August 2022 – May 2023
- Represent non-citizens, incarcerated individuals, and low-wage workers experiencing exploitation and discrimination, including bringing class action suit against MA Department of Correction in Superior Court.
- Provide legal, policy, and other technical assistance to worker centers, local unions, and immigrant advocacy groups, in support of their legislative priorities and other organizing campaigns.

Massachusetts Appleseed Center for Law and Justice Boston, MA
Summer Law Fellow Summer 2022
- Led research to support initiatives related to increasing access to justice, interrupting the school-to-prison pipeline, and assisting youth experiencing homelessness.
- Wrote legal memoranda including on Massachusetts civil rights law and anti-discrimination protections.

The Legal Aid Society New York, NY
Grant Writer (Civil Practice) January 2018 – June 2021
- Led initiatives to scale-up services to New York's immigrant communities in response to the Trump Administration's immigration policies and formulated response to COVID-19 pandemic.
- Worked with senior leadership to develop funding proposals for 21 practice areas including immigration, family law/domestic violence, and affirmative law reform litigation, bringing in $75 million in new funding.

The Carter Center Atlanta, GA
Administrative Assistant (Health, Peace and Education Programs Development) September 2016 – March 2017
- Drafted and edited briefings and talking points for President Carter and other senior management ahead of meetings and engagements with heads of state and foreign government ministers.

U.S. Senator Johnny Isakson Atlanta, GA
Congressional Intern (offer extended for permanent position) January 2016 – August 2016
- Performed legislative and policy research on issues and assisted with official correspondence, constituent services, and coordinating delegation to Presidential Inauguration.

Home Office – Director General's Office, Border Force London, U.K.
Executive Officer June 2015 – August 2015
- Supported the Director General and assisted with policy formulation related to counterterrorism and national security. Wrote briefings, compiled and edited ministerial reports, and responded to press inquiries.

SELECTED VOLUNTEER AND OTHER ADDITIONAL EXPERIENCE

Friends of Kensal Rise Library Ltd London, U.K.
Trustee 2011 – Present
- Founding trustee of local charity set up to run community library following closure; run public relations and fundraising efforts ensuring continuing library operations.
- Created new model for community resource by operating library as wider resource hub connecting individuals to services and conducting community programming, including English as a second language classes and workforce development.

Coalition for the Homeless New York, NY
Driver and Crew Member - Grand Central Food Program January 2018 – August 2021
- Drove van as part of meal distribution program serving over 1,000 food-insecure individuals and New Yorkers experiencing homelessness while connecting them with additional services, such as shelter, assistance with accessing benefits, and case and social workers.

TEDxEmory Atlanta, GA
Speaker 2016
- Developed TED talk on experience of having a stutter and expanding comfort zone; presented to audience of 1,000 people. https://www.youtube.com/watch?v=BSRtEtkg670.

The Royal Burgh of St Andrews St Andrews, U.K.
Community Councilor October 2014 – August 2015
- Elected to the Community Council to represent 16,000 residents and act as bridge to local government.
- Scrutinized council strategy and sat on sub-committees including planning and finance.

Willesden District Scout Council London, UK London, U.K.
Nominated Trustee and Executive Committee Member 2009 – 2013
- Governance role in provision of Scouting for more than 400 young people (gender inclusive) in area of North-West London. Managed approximately 40 volunteers.

BOSTON COLLEGE

Office of Student Services
Academic Transcript

Boston College
Office of Student Services
Lyons Hall 103
140 Commonwealth Avenue
Chestnut Hill, MA 02467

NAME : JONATHAN J BERTULIS-FERNANDES
SCHOOL : LAW SCHOOL
DEGREE : CANDIDATE FOR JURIS DOCTOR
GRADUATE DISCIPLINE : LAW

STUDENT ID#: 84853405
DATE PRINTED: 06/10/2023

FALL 2021 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS2110	CRITICAL PERSPECTIVES IN LAW AND PROFESSIONAL IDENTITY	01	01	P
LAWS2120	CIVIL PROCEDURE	04	04	A
LAWS2130	CONTRACTS	04	04	A
LAWS2140	PROPERTY	04	04	A
LAWS2150	LAW PRACTICE 1	03	03	A-

			ATT	EARN	UNITS
TERM GPA:	3.934	TERM TOTALS:	16	16	15
CUM GPA:	3.934	CUM TOTALS:	16	16	15

SPRING 2022 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS2125	CONSTITUTIONAL LAW	04	04	A
LAWS2135	CRIMINAL LAW	04	04	A
LAWS2145	TORTS	04	04	A
LAWS2155	LAW PRACTICE II	02	02	A
LAWS8065	INTRO RESTORATIVE JUSTICE	03	03	A

			ATT	EARN	UNITS
TERM GPA:	4.000	TERM TOTALS:	17	17	17
CUM GPA:	3.969	CUM TOTALS:	33	33	32

FALL 2022 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS8970	CIVIL RIGHTS CLINIC	07	07	A
LAWS9109	ORWELL'S NIGHTMARE: UNITED STATES LAW AND THE SUPPORT OF ANTI-BLACK RACISM	02	02	A
LAWS9996	EVIDENCE	04	04	B+
LAWS9999	LAW REVIEW	01	01	P

			ATT	EARN	UNITS
TERM GPA:	3.794	TERM TOTALS:	14	14	13
CUM GPA:	3.918	CUM TOTALS:	47	47	45

SPRING 2023 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS3343	ADVANCED CIVIL RIGHTS PRACTICE	03	03	A
LAWS4310	HOUSING LAW AND POLICY SEMINAR	03	03	A
LAWS7731	ADMINISTRATIVE LAW	03	03	A
LAWS9943	CRIMINAL PROCEDURE	03	03	A
LAWS9999	LAW REVIEW	03	03	P

			ATT	EARN	UNITS
TERM GPA:	4.000	TERM TOTALS:	15	15	12
CUM GPA:	3.936	CUM TOTALS:	62	62	57

FALL 2023 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS2192	PROF&MORAL RESPONSIBILITY	03	00	IN PROGRESS
LAWS4444	LOCAL GOVERNMENT LAW	03	00	IN PROGRESS
LAWS7792	FEDERAL COURTS	03	00	IN PROGRESS
LAWS9100	RACE,POLICING&CONSTITUT.	02	00	IN PROGRESS

			ATT	EARN	UNITS
TERM GPA:	0.0	TERM TOTALS:	11	00	00
CUM GPA:	3.936	CUM TOTALS:	73	62	57

TOTAL CREDITS EARNED : 62 CUM GPA : 3.936

END OF RECORD

ISSUED TO : JONATHAN J BERTULIS-FERNANDES
36 BROOKSIDE AVENUE
APARTMENT 3
JAMAICA PLAIN
MA

Bryan D. Jones
University Registrar

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Candidacy of Jonathan Bertulis-Fernandes

Dear Judge Sanchez:

It is my great pleasure and privilege to be able to recommend Jonathan Bertulis-Fernandes to you for placement as a Clerk with you and your court. Jonathan is, without any doubt in my mind, one of the best students I have had the opportunity to teach and work with. He is already an excellent legal thinker and practitioner, and will be both an excellent clerk and attorney.

For background and context, I currently serve as an Adjunct Professor of Law and Assistant Director of Campus Ministry at Marquette University; prior to this appointment, I served as a Drinan Scholar and Visiting Lecturer at Boston College Law School. It was during my time at BC that I met Jonathan; he was a student in my first-year Constitutional Law course in the Spring 2022 semester (Jan May 2022). My own academic training includes a J.D. from the University of Wisconsin, an LL.M. with a focus in Law and Religion from Emory University, as well as a Master of Arts in Philosophical Resources (Fordham University) and a Master of Divinity (Jesuit School of Theology of Santa Clara University). With such a background, in addition to multiple academic appointments in law school settings, I have a breadth of experience with students of varying quality and ability. Jonathan is among the best.

I was impressed almost from the beginning of the semester with Jonathan in my class. First-year courses are difficult to stand out in and can be intimidating places. Yet Jonathan from almost the first day was asking questions, offering responses, and engaging in class discussion. While I may have struggled to learn the names and get a sense of all 80-plus students in that class, Jonathan was one I knew and recognized quite quickly. Moreover, his questions and comments demonstrated insight into both the actual cases and legal doctrines we were discussing, as well as the policy and constitutional theory issues behind those doctrines. Indeed, a fundamental component of my own teaching with regard to constitutional law is to explore those more abstract issues of constitutional structure and theory. This is can be a different approach than other courses, particularly first-year courses which focus much more on traditional doctrine and legal fundamentals. Many students find this a difficult academic switch. Jonathan did not. He excelled in the class.

This was particularly impressive given that Jonathan, having grown up and had his initial post secondary education in the United Kingdom, did not always share the background assumptions or knowledge of the constitution that students (or professors!) from the United States take for granted. Almost immediately, Jonathan approached me for resources that would allow him to learn these background principles or assumptions. I offered him a variety of resources. While not overwhelming, this additional task clearly added to the work he had to do, and was something he voluntarily took on. Given that he earned one of the few grades of" A" in my class, he succeeded.

More than just demonstrating academic excellence, though, he demonstrated exactly the kind of self-confidence needed in a successful clerk or lawyer. He was confident enough in his own abilities, and self-aware enough to know where his own intellectual lacunae were, to ask for help. Rather than simply hope to pick up this information by osmosis, or guess at it via contextual clues in cases and class discussions, he asked for the help he needed and the resources that would allow him to succeed. And, even in class, I can recall points where our casebook or my own discussion would assume a student would know how something functioned in American government, and Jonathan would ask me to clarify. In addition to being useful for himself, it was also a great benefit to his colleagues.

This combination of intellectual excellence and self-aware confidence that makes for an excellent lawyer or law clerk (or legal professional generally). When you ask Jonathan to research questions presented in a case or the various arguments made in briefs or arguments, you will receive excellent synthesis and analysis of the materials. Moreover, Jonathan will be able to ask insightful questions about these cases and, perhaps more importantly, about your own instructions for him and expectations. He will be an excellent aid to your work and a fantastic colleague for other staff in your court.

As I have gotten to know Jonathan and his background, I realize that none of this ought to be surprising. Before taking my class, before coming to law school, Jonathan was clearly engaged in working for the public interest and the common good, and was highly successful at that work. Working for The Legal Aid Society, as a Community Councilor, as a local neighborhood advocate, among other work and activities, demonstrates that Jonathan not only understands the doctrines shaping the legal system, but also how that system works to actually improve the lives of individuals and communities. He has been embedded with the legal system in all its various and manifold expressions - legislative, executive, administrative, judicial, as well as public and private. Though the specific contexts may be different, ranging from London to New York to Atlanta to Boston, the active engagement with the law has been consistent.

Again, this is exactly what makes for an excellent lawyer, an excellent clerk, even an excellent professor or judge. Intellectually curious persons can learn legal doctrine and even apply them in various fact patterns. Excellence in the law, though, comes from understanding how the law actually ebbs and flows through the systems, individuals, and institutions, it engages with. Law is not a mystery cult. Understanding this dynamic will allow Jonathan to be among the best clerks and legal professionals.

Nathaniel Romano - romanone@bc.edu

There is no doubt in my mind that Jonathan will be an excellent clerk for you and your court. It is my distinct pleasure to recommend him to you. I am happy to discuss this further with you, if that would be helpful; you can reach me via electronic mail at nathaniel.romano@marguette.edu or by telephone at
(414) 288-4507. Until then, I remain,

Very Truly Yours,

Rev. Nathaniel Romano, S.J., LL.M
Adjunct Professor of Law
Assistant Director of Campus Ministry

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Candidacy of Jonathan Bertulis-Fernandes

Dear Judge Sanchez:

It is a true honor to write this letter in support of Jonathan Bertulis-Fernandes' application for a judicial clerkship following his graduation from Boston College Law School in May 2024. He is one of the smartest, kindest and most remarkable students I have ever taught (and I have taught more than 2000). He is outstanding in every good and important way, and I recommend him most highly.

I had the privilege of teaching Jonathan throughout his 1L year in BC Law's five-credit skills curriculum, entitled "Law Practice 1 & 2." The program simulates the practice of law by requiring students to function as early-career attorneys, working first as assistant district attorneys, and then as junior associates in private practice. In contrast to doctrinal courses which "go wide" in covering a broad range of topics, Law Practice "goes deep" by focusing on just three simulations for each semester and hammering analysis, analysis, and analysis. In the process, students learn how to construct and communicate a sophisticated written work product for a busy and impatient reader, while also developing superior research skills.

Throughout his year-long Law Practice studies with me, Jonathan consistently demonstrated that he is brilliant, disciplined and absolutely determined to achieve professional excellence. He chose the legal profession to help others and he works hard at law school to equip himself to serve his clients well. Whether an assignment involved an in-depth written analysis or an extemporaneous oral critique of an intractable legal issue, Jonathan never failed to produce a superior work-product. He was always prepared and in command of the material, and his memos were genuinely gratifying to read. His spring semester oral argument of a hyper-technical issue of statutory interpretation was cogent, well organized, carefully reasoned and skillfully delivered. In providing oral and written feedback to his peers, he was critical in the most helpful sense: his comments were insightful, his reasons were well-taken, his suggested revisions were right on the mark and his presentation of the foregoing was encouraging and supportive.

BC students correctly describe their Law Practice coursework as the most challenging and fundamental part of their three years at BC Law. Our LP program is built on increasingly difficult assignments, copious faculty feedback, and ongoing opportunities to re-do, revise and get it right. In this way, the LP curriculum teaches the student to recognize what qualifies as successful analysis and communication, and understand how to reproduce it on a deliberate and consistent basis. Accordingly, when providing written feedback on each of Jonathan's memo assignments, I spent at least 1.5 to 2 hours parsing each line to identify mistakes, explain why they occurred and show how to correct them. I also elaborated on why the suggested revision offered a more effective and efficient approach to serving the reader's need for analytical precision and efficiency – and I provided just as many details in explaining what worked well. Jonathan took that feedback, ran with it in revising prior work, generalized it to newly submitted material, and withstood additional rounds of painstaking feedback. Through this iterative and, for the student, often frustrating process, Jonathan learned how to work for a busy and impatient supervisor who needs and expects him to get to the point, make it, support it and move on. The course frustrates most students and indeed, is designed to do just that. But Jonathan was game for whatever I threw at him because his unavoidable frustration was outweighed by his enduring commitment to professional excellence.

Jonathan's energy and appetite for becoming a great lawyer were not limited to Law Practice. By the close of his 1L year, he had earned a 3.969 GPA. At the conclusion of his 2L fall semester, he reported his grades had "dipped" to a 3.919. These staggering statistics place him solidly at the pinnacle of his class although they do nothing to indicate his enormous personal challenges beyond the classroom. An international student, Jonathan spent much of his 1L year traveling back and forth to London – often on an abruptly scheduled flight - because his father was extremely ill. Jonathan was understandably heartbroken when his father passed shortly before the spring semester's final exams, but he put his head down, focused, worked hard and landed in the top five percent of his class. At the same time, he remained focused on his goal of building a life and career in the United States by studying to become a U.S. citizen. In fact, as I write this letter on February 2, 2023, Jonathan is taking the Oath of Allegiance at Boston's historic Faneuil Hall and receiving his Certificate of Naturalization.

Along the way, Jonathan has had to deal with another challenge that has affected him since childhood: a stutter or, as the Brits would put it, a stammer. Whatever the term, Jonathan has learned not just to manage it but, with his typical blend of discipline and determination, transform it into his very own super power. He describes the process of doing so in a 2016 TedX Talk, delivered while studying as a Bobby Jones Scholar at Emory University. Entitled "The Comfort Zone: An Artificial Barrier," the talk is beautifully composed and movingly spoken. Its content draws on his innate wit and true artistry with words. In this talk, Jonathan bravely details his resolve to transcend the pain and fear of withstanding the hurtful remarks from the latest, ill-informed and judgmental stranger. He begins by educating viewers on the nature of a stammer, and then describes how he came to recognize and eventually embrace the harsh fact that he can neither prevent nor control the hurtful reactions of others. He leans on gratitude for his parents while underscoring the irony of them giving him a nine-syllable name that challenges anyone to pronounce it. Along the way, he invokes Jean Paul Sartre more than once, while doing so with exquisite prose that Sartre himself would envy. For instance, in recounting his decision to push beyond his stammer and reject the inhibitions it carried, he observes that "the

MaryAnn Chirba - maryann.chirba@bc.edu - 781-697-2233

illusion of control – and it is an illusion – ultimately gets in the way of us truly experiencing life" by acting as an "illusory restraint against the inherent beauty in the unexpected and uncontrollable that we insulate ourselves from - every single day."

Jonathan shared the link to this talk in response to a brief assignment I give at the start of each 1L year. Because I have a poor memory for names, I use this exercise to obtain a few details that will assist in learning names and getting to know those who are about to be stuck with me for the next two semesters. The URL to Jonathan's talk certainly helped me to learn his name; it also made it abundantly clear that I was beyond fortunate to have this unforgettable person walk into my classroom and my life. I have been blessed to work with and get to know Jonathan Bertulis-Fernandes, and I urge you to do the same. Whether or not you decide to interview and ultimately extend a clerkship invitation to him, I urge you to take ten minutes to watch his TedX Talk at:

https://www.youtube.com/watch?v=BSRtEtkg670

I am confident you will be moved and will be better as a result. For these reasons and more, I recommend Jonathan Bertulis-Fernandes most highly and enthusiastically. Please contact me at 508-320-5175 or chirbama@bc.edu if I can be of further assistance. And thank you for considering his candidacy. As I've already stated, he is outstanding in every good and important way.

Most sincerely,

Mary Ann Chirba

MaryAnn Chirba - maryann.chirba@bc.edu - 781-697-2233

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Candidacy of Jonathan Bertulis-Fernandes

Dear Judge Sanchez:

I am thrilled to provide a recommendation for Jonathan Bertulis-Fernandes as part of his judicial clerkship application. I am an Assistant Clinical Professor at Boston College Law School and Director of the Civil Rights Clinic. Jonathan has been a student attorney in my Civil Rights Clinic since August 2022, so I have had the absolute pleasure of working closely with and supervising him for approximately six months. During his time in the clinic, Jonathan has drafted numerous legal documents that have allowed me to observe his excellent legal research, writing and analysis skills. These documents include numerous legal memoranda on issues of statutory and constitutional law, discovery requests, filings related to motion practice, and a brief in support of class certification in a complex civil rights matter. In my nearly five years of teaching, Jonathan is easily among the top 5% of students I have ever taught or supervised for many reasons that I hope my letter will illuminate.

Jonathan has not ceased to impress me with his ability to produce the highest quality work for our clinic clients, requiring little editing from me, even at this early stage in his legal career. He routinely finds probative cases and authorities that other students have difficulty finding and has an uncanny ability to distill complex legal principles and communicate them clearly to colleagues and clients alike. Additionally, on numerous occasions, Jonathan has identified important legal arguments and crafted creative legal theories to advance our clients' interests that were overlooked by other members of our legal team. I have been a practicing attorney for a little over a decade, and Jonathan, despite being a law student, often exhibits greater analytical abilities and professional judgment than some of the junior attorneys I have mentored. Lastly, his legal writing is top-notch; it is clear, compelling, well-organized and concise. Simply put, it is a joy to read Jonathan's writing.

Jonathan's professional maturity in the workplace is commendable and will serve him well as a judicial law clerk. I have seen first-hand how effectively he manages his time and meets competing deadlines, all while producing stellar work. This is what makes him stand apart from other law students, who often excel in a few but not all of these areas. The Civil Rights Clinic is one of the most challenging and demanding educational experiences at Boston College Law School, and Jonathan has excelled in this clinic for two semesters while maintaining a 3.9 GPA, being on law review and serving as a student leader on campus. Additionally, I see Jonathan's leadership and collaboration skills daily, as he deftly works with his fellow clinic students, co-counsel at a large law firm, and clients to meaningfully incorporate everyone's input into cohesively written work products. I clerked for a federal judge in a U.S. District Court and am acutely aware of the organizational and professional skills a judicial law clerk must have in order to best support a judge's heavy workload. Jonathan possesses these skills in abundance. Jonathan's work experience prior to law school including at the Legal Aid Society have undoubtedly contributed to his superior case management and organizational skills – assets that will make him a very valuable judicial law clerk.

Lastly, Jonathan's personal attributes make him a terrific colleague. He is empathetic, friendly and a wonderful conversationalist and listener. His positive attitude and energy uplifts those around him, something I, myself, have benefited from countless times. He has earned the admiration and respect of his clinic classmates with his willingness to offer a helping hand, often carrying more of the team's workload in their times of need. I consider Jonathan as a colleague and would count myself as very lucky if I could have the opportunity to work with him again at some point in the future. I wholeheartedly recommend Jonathan for this judicial clerkship. Thank you for your consideration of his application, and please do not hesitate to contact me if I can be of any further assistance.

Sincerely,

Reena Parikh
Assistant Clinical Professor
Director, Civil Rights Clinic
BC Legal Services LAB
Boston College Law School
885 Centre Street
Newton, MA 02459
(617) 552-0283
parikhre@bc.edu

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Candidacy of Jonathan Bertulis-Fernandes

Dear Judge Sanchez:

I am delighted to write this clerkship recommendation for my former student, Jonathan Bertulis-Fernandes. He is just a marvelous person and already an academic superstar here. He is a master of legal analysis with perfect A's across all of the big first year classes, combined with compassion and a profound capacity to meet challenges at the highest level. He will be an amazing clerk.

I was fortunate to have Jonathan in class in his first semester in law school and he stood out in the large (masked) first-year property class. He was always prepared, capable of offering both precise answers to legal doctrine as well as thoughtful insights and reflections. Despite his exceptional prior academic record with First Class Honors at St. Andrews, Jonathan was uncertain about whether he would excel to the same degree. I had absolutely no doubt based on his outstanding performance in class and office hours—and as his top 5% placement in the class shows, law school exams presented no difficulty. Jonathan has a commitment to work and preparation, and the analytical insight that one sees in the very finest lawyers. When Jonathan spoke in class, everyone wrote down what he said and I never needed to add anything to his comments.

Jonathan has already made an incredible mark on BC Law. He is a Public Service Scholar—a full tuition scholarship awarded to exceptional students who are deeply committed to practicing public interest law. He is co-President of the South Asian Law Students Association and involved with the Disability Law Students Association. Jonathan is Editor in Chief of the Boston College Law Review, and I know he is held in great esteem there. He is an Academic Success Program Peer Tutor (a very competitive position)—and I have observed him on many afternoons patiently helping 1L students. In every dimension, Jonathan has established himself as a student leader. But one cannot imagine a more modest student leader—it was only in writing this letter that I came to appreciate the vast depth of his experience (including working at The Carter Center and Legal Aid) and his real commitment to volunteering in meaningful and transformative ways (including a long time with the Coalition for the Homeless's Grand Central Food Program).

Jonathan comes to law deeply aware of the power of law to burden and help people. As he explained to me, he "grew up in London, in what is one of the most impoverished and diverse neighborhoods of the United Kingdom." At 16 years of age, he won an academic scholarship to attend a private school and then went on to his exceptional career at St. Andrews. He later co-founded a community non-profit in his neighborhood of London (Friends of Kensal Rise Library) to help save the local library, which after legal actions, was chosen to run the library. This experience led Jonathan to see the law as a potential instrument of empowerment for social inequities. Jonathan is going to do amazing work as a lawyer dedicated to a vision of social justice.

I am so happy that Jonathan has decided to pursue clerking. I know that he will be an exceptional clerk. I hope that you will consider him for a place in your chambers.

Sincerely,

Mary Sarah Bilder
Founders Professor of Law
bilder@bc.edu

Jonathan Bertulis-Fernandes
36 Brookside Avenue #3, Boston, MA 02130
bertulij@bc.edu - (651) 383-7807

Writing Sample

The attached is a memorandum that I wrote at the end of my 1L second semester as part of the write-on competition for the Boston College Law Review.

The memorandum assignment asked students to argue in favor of a motion to dismiss on the basis of an entrapment defense. The competition was a closed universe that provided students with all of the cases and facts to be used and prohibited the use of any other cases or research. The competition also provided the template.

This memorandum has been edited by only myself.

Bertulis-Fernandes, J – Writing Sample

STATE OF MINNESOTA **COUNTY OF BLUE EARTH**	**DISTRICT COURT** **FIFTH JUDICIAL DISTRICT**
STATE OF MINNESOTA, **Plaintiff,** **vs.** **MICHAEL VARNSEN,** **Defendant.**	**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS** **File No.: 22-1695**

The Defendant, Michael Varnsen, moves the Court to dismiss the above-captioned complaint charging him with 5th Degree Sale of a Controlled Substance in violation of Minnesota Statute 152.025. Because law enforcement induced Mr. Varnsen to commit the charged offense and the Government has failed to show beyond a reasonable doubt that Mr. Varnsen was predisposed to commit the crime, the Court must dismiss the complaint against the Defendant on the grounds of entrapment.

Pursuant to Rules 26.01 and 9.02 of the Minnesota Rules of Criminal Procedure, the Defendant has waived his right to present the entrapment defense to a jury and now submits the defense to the Court for its determination. To expedite the Court's determination of this motion, the Defendant and the State have stipulated to all facts for the purpose of the motion. The parties have filed the stipulation with the Court.

Because Detective Landry induced Mr. Varnsen to commit the crime with which he is charged and because the State cannot prove beyond a reasonable doubt that Mr. Varnsen was predisposed to commit that crime, this Court must dismiss the complaint against Mr. Varnsen.

STATEMENT OF THE CASE

The facts are undisputed. In 2009, when he was only eighteen, Mr. Varnsen was convicted of a drug possession charge. *Stipulation of Facts ("Stip.")* ¶ 3. At the age of nineteen—in 2010—Mr. Varnsen pleaded guilty to transferring stolen property. *Id.* In the twelve years since, Mr. Varnsen has not had any criminal convictions for drug or other offenses. *Id.* ¶ 1. Mr. Varnsen is now thirty-one years old and works part-time as a mechanic while studying at South Central College. *Id*. He is only six credits short of an associate's degree in electronics. *Id.*

On March 21, 2022, Mr. Varnsen was standing with another person outside of an apartment building at 1638 Moreland Avenue, Mankato, Minnesota when Detective Daniel Landry of the Mankato Police Department approached him. *Id.* ¶¶ 5–8. An informant had told Detective Landry that marijuana was being sold nearby. *Id.* ¶ 5. Detective Landry asked Mr. Varnsen and the other individual: "Either you guys know where I can get some weed?" *Id.* ¶ 8. Mr. Varnsen replied that he did not know where Detective Landry could get marijuana. *Id*. Detective Landy repeated this question and Mr. Varnsen replied for a second time that he did not know anything about marijuana being sold nearby. *Id*. Detective Landry then walked away from Mr. Varnsen and left the immediate area. *Id.* ¶ 9.

Some forty-five minutes later, Detective Landry again approached Mr. Varnsen and asked him for a third time whether he could sell him marijuana. *Id.* ¶ 12. Mr. Varnsen replied again that he did not know anything about the sale of marijuana. *Id.* Detective Landry then proceeded to ask a fourth time, saying: "My friend told me he just got some down here. Look, I just finished an intense deployment. I need the weed for PTSD. You gotta help me out." *Id.* Mr. Varnsen replied, again, that he was not involved in selling marijuana. *Id.* By this point, Detective Landry had asked Mr. Varnsen about buying marijuana some four times across two separate

instances. *Id.* ¶¶ 8–12. Detective Landry then asked a fifth time, claiming: "Come on, I've been through a lot in the past seven months. I really need it. You must know someone you can call who has something. You gotta help me out." *Id.* ¶ 12. This time, Mr. Varnsen told him he potentially knew "another vet" who could help him and made a phone call. *Id.* ¶¶12–13.

Mr. Varnsen walked with Detective Landry for approximately four blocks to another apartment building at 1215 Moreland Avenue, Mankato, Minnesota. *Id.* ¶ 14. Mr. Varnsen then gave Detective Landry a bag containing seven grams of marijuana in exchange for $80. *Id.* ¶¶ 15–17. Detective Landry then placed Mr. Varnsen under arrest. *Id.* ¶18. Mr. Varnsen was subsequently charged with 5th Degree Sale of a Controlled Substance in violation of Minnesota Statute 152.025. *Id.*

ARGUMENT

The charges should be dismissed because Mr. Varnsen was entrapped by Detective Landry. Mr. Varnsen was entrapped by Detective Landry because: (1) the preponderance of evidence demonstrates that the Government induced Mr. Varnsen to commit the charged offense, and (2) the State has failed to meet its burden of demonstrating beyond a reasonable doubt that Mr. Varnsen was predisposed to commit the offense of selling marijuana.

I. The Defense of Entrapment Prevents Wrongful Convictions by Ensuring That Defendants Who Were Induced to Commit a Crime and Otherwise Not Predisposed to Commit the Charged Offense are Not Convicted.

Detective Landry entrapped Mr. Varnsen because he induced Mr. Varnsen to sell marijuana and Mr. Varnsen was not otherwise predisposed to commit the charged offense. *See Stip.* ¶¶ 8–20. Under the "subjective approach" to entrapment followed in Minnesota, a government agent unlawfully entraps a defendant when they induce a defendant to commit a charged offense and the defendant was not otherwise predisposed to commit the offense prior to

interaction with law enforcement. *See State v. Grilli*, 230 N.W. 2d 445, 451–54 (Minn. 1975). To assert an entrapment defense successfully, the defendant must first show by a preponderance of evidence that the Government induced the defendant to commit the crime. *See State v. Johnson*, 511 N.W. 2d 753, 754 (Minn. Ct. App 1994). The burden then shifts to the Government to show beyond a reasonable doubt that the defendant was predisposed to commit the charged offense prior to first interacting with the Government. *Id.* These two elements ensure that only individuals that do not have original criminal purpose—and not those who were merely provided an opportunity by the Government to commit a crime that they were already inclined to commit—may avoid conviction by asserting entrapment. *See State v. Potter*, No. CX-97-1147, 1998 WL 171346, at *2 (Minn. Ct. App. Apr. 14, 1998).

The defense of entrapment is a key protection afforded defendants in the State of Minnesota and ensures that only individuals who actually intended to commit a charged offense are convicted of a crime. *See State v. Poague*, 72 N.W. 2d 620, 624 (Minn. 1955). The entrapment defense prevents otherwise law-abiding individuals from being wrongly convicted as a result of over-zealous law enforcement practices. *See Grilli*, 230 N.W. 2d at 451–52; *Poague*, 72 N.W. 2d at 624.

II. The Court Must Grant Defendant's Motion to Dismiss on Grounds of Entrapment.

A. The Government Induced Mr. Varnsen to Commit the Charged Offense.

The Government induced Mr. Varnsen to commit the charged offense because Detective Landy repeatedly harassed and pressured Mr. Varnsen into selling him marijuana. *See Stip.* ¶¶ 8–20. To demonstrate that the Government induced a crime, a defendant must show that the Government actively persuaded and pressured the defendant and did more than simply provide them with an opportunity to commit a crime. *See State v. Olkon*, 299 N.W. 2d 89, 107–08 (Minn.

1980). Government inducement requires "something in the nature of persuasion, badgering, or pressure by the state," where the Government's actions go further than necessary to produce evidence of criminality and instead actively pressure the defendant into committing a crime. *Olkon*, 299 N.W. 2d at 107; *see Grilli*, 230 N.W. 2d at 452 (holding that entrapment occurs when a defendant is "lured . . . into committing an offense which he otherwise would not have committed and had no intention of committing."). While merely soliciting a crime is not sufficient to show inducement, repeated solicitation by the Government *does* show that it induced a crime because this demonstrates that the defendant's original inclination was to not commit the crime prior to being pressured by the Government. *See Johnson*, 511 N.W. at 755.

Mr. Varnsen provided Detective Landry with marijuana only after Detective Landry asked him about the sale of marijuana some five times and approached him on two separate occasions. *Stip.* ¶¶ 8–19. In *State v. Johnson*, the Government induced a defendant caught in a law enforcement "reverse sting" to commit drug trafficking offenses when police officers continued to press their offer to sell him drugs after he had initially refused to buy them. *See* 511 N.W. 2d at 755–56. As the court explained in *Johnson*, inducement occurs when a government agent continues to pressure and encourage someone to commit a crime after they have already refused to do so and shown that their original inclination was not to commit the charged offense. *Id.* Detective Landry's repeated solicitation and harassment induced Mr. Varnsen to sell marijuana because, like in *Johnson*, Detective Landry repeatedly solicited him to sell drugs despite his refusals. *Stip.* ¶¶ 8–19; *see* 511 N.W. 2d at 755–56. During Detective Landry's repeated solicitations, Mr. Varnsen repeatedly refused to commit the charged offense—stating multiple times that he was not involved in selling marijuana. *Stip.* ¶¶ 8–18. Despite Mr. Varnsen's repeated refusals, Detective Landry refused to accept his answers and continued to

harass and pressure him, going so far as to approach him a second time and some forty-five minutes after Mr. Varnsen had first refused to sell him marijuana. *Id.* ¶¶ 8–12. Mr. Varnsen's repeated refusals to use Detective Landry's solicitations as an opportunity to sell him marijuana show that he was not inclined to sell Detective Landry marijuana and only agreed to do so following sustained pressure by him. *Id.* ¶¶ 8–19; *see Johnson*, 511 N.W. 2d at 755–56.

Mr. Varnsen did not initiate any of the interactions with Detective Landry, all of which Detective Landry himself continued to lead despite Mr. Varnsen's refusal to engage with him. *Stip.* ¶¶ 8–12. In *State v. Lombida*, the Government did not induce a man to sell cocaine when he voluntarily met with a police officer on multiple occasions with the express purpose of selling illegal drugs. *See* No. A11–537, 2012 WL 1380264, at *1–3 (Minn. Ct. App. Apr. 23, 2012). Similarly, in *State v. Bauer*, the Government did not induce the defendant to commit the charged offense as the defendant themselves initiated the sale of ecstasy. *See* 776 N.W.2d 462, 470–471 (Minn. Ct. App. 2009). Unlike in *Lombida* and *Bauer*, Mr. Varnsen did not initiate the sale of marijuana nor did he enter into any of the interactions with Detective Landry with the purpose of selling him marijuana. *Stip.* ¶¶ 8–19; *see Lombida*, 2012 WL 1380264, at *3; *Bauer*, 776 N.W.2d at 470–471. By contrast, the exchange of marijuana was solely solicited by Detective Landry and occurred even though Mr. Varnsen repeatedly refused to sell him marijuana. *Stip.* ¶¶ 8–19. The marijuana sale originated solely with Detective Landry and Mr. Varnsen would not have committed the crime without his pressure. *Id.*; *see Johnson*, 511 N.W. 2d at 755–56.

B. Mr. Varnsen Was Not Predisposed to Commit the Charged Offense.

Additionally, the Government has failed to meet its burden and has not shown beyond a reasonable doubt that Mr. Varnsen was predisposed to commit the offense of selling marijuana before interacting with Detective Landry. *See Stip.* ¶¶ 8–19; *Johnson*, 511 N.W. 2d at 755–56.

When considering whether or not a defendant was predisposed to commit the charged offense before interaction with a government actor, courts consider evidence related to several factors, including: prior criminal activity and criminal reputation together with other factors that may suggest criminal predisposition such as circumstantial evidence or whether the defendant readily accepted the government's solicitation. *See In re Welfare of G.D.*, 473 N.W. 2d 878, 883 (Minn. Ct. App 1991). The Government must also demonstrate that the defendant was predisposed to commit the crime before first being approached by government agents and cannot rely on the defendant's actions after being approached to show they were predisposed. *See Johnson*, 511 N.W. at 755.

When examining criminal activity, courts consider both prior criminal convictions and criminal activity not resulting in convictions. *In re Welfare of E.E.B.*, No. A08–0893, 2009 WL 1374313, at *3 (Minn. Ct. App. May 19, 2009). Past or current criminal involvement is only relevant if it suggests predisposition to commit the charged offense at the time that the Government solicited the commission of the crime, as opposed to demonstrating past or general criminal predisposition more broadly. *See Johnson*, 511 N.W. at 755. As a result, past involvement in criminal activity does not suggest predisposition to commit the charged offence if it does not show that this involvement is ongoing. *Id*. A defendant's criminal reputation, and whether they were known to have committed crimes or were otherwise engaged in criminal acts, can also be used by a court to find that they were predisposed to commit a crime. *See Potter*, 1998 WL 171346, at *3. Additionally, courts may also determine predisposition to commit certain crimes based on circumstantial evidence that suggests the defendant was involved in particular criminal activity. *See State v. White*, 332 N.W.2d 910, 912 (Minn. 1983). Finally, whether an individual readily and willingly accepted the government agent's solicitation can

also be used to find that the defendant was predisposed to commit a crime. *See Olkon*, 299 N.W. 2d at 108 (holding that an attorney's immediate willingness to assist a client in filing a fraudulent insurance claim show he was predisposed to commit insurance fraud).

The Government cannot show beyond a reasonable doubt that Mr. Varnsen was predisposed to commit the charged offense because he does not have any criminal convictions that demonstrate an ongoing predisposition to commit the charged offense nor does he have a criminal reputation. Further, Mr. Varnsen did not readily accept Detective Landy's solicitation and there is no circumstantial evidence that suggests that Mr. Varnsen was otherwise predisposed.

a. *Mr. Varnsen's prior convictions do not demonstrate an ongoing predisposition to sell marijuana and the Government cannot demonstrate that Mr. Varnsen has a criminal reputation.*

Mr. Varnsen's prior convictions do not suggest he was predisposed to sell marijuana. *See Stip.* ¶ 3. As the court explained in *In re Welfare of E.E.B.* when it held that a defendant who regularly used cocaine was nonetheless not predisposed to sell it, merely using illegal drugs previously does not establish intent to *sell* illegal drugs. *See Stip*. ¶ 3; 2009 WL 1374313, at *2. As in *E.E.B.*, Mr. Varnsen's prior illegal drug use (in this instance, a prior conviction for possession of marijuana) shows only that Mr. Varnsen used drugs some thirteen years ago and, most critically, does not establish an ongoing intent to sell illegal drugs. *See* 2009 WL 1374313, at *2. Further, Mr. Varnsen's conviction for transferring stolen property is similarly entirely different, as a matter of law, to selling drugs and does not show a predisposition to commit the charged offense. *See Stip.* ¶ 3; *E.E.B.*, 2009 WL 1374313, at *2.

In any event, as the court reasoned in *Johnson* when it held that a man who had been convicted for drug trafficking twenty years previously was not predisposed to sell marijuana,

past criminal activity does not show predisposition where there is no evidence this criminal involvement was ongoing. *See* 511 N.W. at 755. As in *Johnson*, Mr. Varnsen's convictions for two offenses do not show any ongoing involvement with criminal activity. *See* Stip. ¶ 3; 511 N.W. 2d at 755. Courts have consistently held that the only relevant time period for determining whether an individual was predisposed to commit a charged offense is the time at which the government solicited the crime. *See Johnson*, 511 N.W. 2d at 755 (explaining how predisposition at "the time of solicitation . . . [is] the only relevant time"). The most recent of Mr. Varnsen's prior criminal convictions occurred some twelve years ago when he was only nineteen years old. *Stip.* ¶ 3. These past criminal convictions do not establish that he was predisposed to sell marijuana because they do not show that his involvement in criminal activity was ongoing at the time that Detective Landry solicited the crime. *Stip*. ¶¶ 3-12; *see Johnson*, 511 N.W. 2d at 755.

Further, the Government does not successfully assert that Mr. Varnsen had a criminal reputation or was otherwise involved in selling marijuana prior to interacting with Detective Landry. *Stip.* ¶¶ 1-20; *see Potter*, 1998 WL 171346, at *3. The Government has not provided evidence that Mr. Varnsen was involved in any uncharged criminal activity or even that Mr. Varnsen was known to be involved in selling marijuana. *Stip*. ¶¶ 1-20; *see Grilli*, 230 N.W. 2d at 451. Indeed, Mr. Varnsen was entirely unknown to Detective Landry, who acted on general intelligence that marijuana was being sold nearby rather than that Mr. Varnsen himself was selling it. *Stip*. ¶¶ 5–7.

b. *The Government cannot point to circumstantial evidence suggesting involvement in selling marijuana and Mr. Varnsen did not readily accept Detective Landry's solicitation.*

No evidence asserted by the Government establishes, even circumstantially, that Mr. Varnsen was predisposed to sell marijuana. *Id.* ¶¶ 1–20; *see White*, 332 N.W.2d at 912. In *State*

v. White, the court held that the Government had circumstantially proved the defendant's intent to sell drugs as the defendant was found with a large quantity of illegal drugs and packaging materials. *See* 332 N.W.2d at 912. By contrast, Mr. Varnsen was not found in possession of a large quantity of marijuana or with packaging materials or other paraphernalia that suggested he was involved in selling drugs. *Stip*. ¶¶ 1–20; *see White*, 332 N.W.2d at 912.

Further, Mr. Varnsen did not readily accept Detective Landry's solicitation: by contrast he steadfastly refused Detective Landry's approaches and repeatedly asserted that he was not involved or interested in selling marijuana. *Stip*. ¶¶ 1–20; *see Johnson*, 511 N.W. 2d at 755–56. Mr. Varnsen's responses to Detective Landry's repeated solicitations show that Mr. Varnsen's original inclination was not to commit the crime, even when given a clear opportunity to do so, and demonstrate that he was not predisposed to commit the charged offense. *Stip*. ¶¶ 1–20; *see Johnson*, 511 N.W. 2d at 755–56. Thus, even in the absence of relevant criminal convictions, the Government still fails to demonstrate that Mr. Varnsen was predisposed to sell marijuana prior to first interacting with Detective Landry. *See White*, 332 N.W.2d at 912.

CONCLUSION

Because law enforcement induced Mr. Varnsen to commit the charged offense and the Government has failed to show beyond a reasonable doubt that Mr. Varnsen was predisposed to commit the crime, the Court must dismiss the complaint against the Defendant.

Respectfully submitted on behalf of
MICHAEL VARNSEN Defendant

_____
Jonathan Bertulis-Fernandes, Esq.

DATE: 5/31/2022

Applicant Details

First Name	**Luke**
Middle Initial	**Andr**
Last Name	**Beyer**
Citizenship Status	**U. S. Citizen**
Email Address	**labeyer@umich.edu**
Address	**Address** Street **1018 Granger Ave** City **Ann Arbor** State/Territory **Michigan** Zip **48104** Country **United States**
Contact Phone Number	**9198862381**

Applicant Education

BA/BS From	**University of North Carolina-Chapel Hill**
Date of BA/BS	**May 2019**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 3, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Journal of Race & Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Thomas, Kim
kithomas@umich.edu
734-647-4054
Bashi, Amanda
amanda_bashi@fd.org
Brensike Primus, Eve
ebrensik@umich.edu
734-615-6889

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Luke Beyer
1018 Granger Ave.
Ann Arbor, Michigan 48104
(919) 886-2381
labeyer@umich.edu

June 12, 2023

The Honorable Judge Juan R. Sánchez
U.S. District Court for the Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street,
Philadelphia, PA 19106

Dear Judge Sánchez:

I am a rising third-year student at the University of Michigan Law School, and I am writing to apply for a clerkship in your chambers for the 2024–2025 term or your next available term.

Prior to law school, I worked as an investigator at the public defender's office in Detroit, and that experience solidified my decision to pursue a career in indigent criminal defense. In law school, I have worked to develop the skillset necessary to passionately defend clients through participating in opportunities like Mock Trial, the Juvenile Justice Clinic, and the Public Defender Training Institute. However, before I begin my career as a defender, I am excited by the prospect of clerking. I am confident that serving as a clerk in your chambers will provide me with a unique opportunity to hone my writing skills, wrestle with the law through legal research, and gain a deeper understanding of judicial decision-making and legal advocacy. In addition to these motivations, I believe that my experiences like writing my undergraduate honors thesis, serving as Executive Articles Editor on the *Michigan Journal of Race & Law*, and conducting legal research and writing at the Federal Community Defender of the Eastern District of Michigan will allow me to strongly contribute to the work being done in your chambers.

I have attached my resume, law school transcript, and a writing sample for your review. Letters of recommendation from the following professors are also attached:

- Professor Eve Primus: ebrensik@umich.edu, (734) 615-6889
- Professor Kimberly Thomas: kithomas@umich.edu, (734) 763-1193
- Assistant Federal Defender Amanda Bashi: amanda_bashi@fd.org, (313) 967-5845

Thank you for your time and consideration.

Respectfully,

Luke Beyer

Luke Beyer

1018 Granger Ave., Ann Arbor, MI 48104
(919) 886-2381 • labeyer@umich.edu • He/Him

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor — Expected May 2024
Honors: Dean's Scholarship — GPA: 3.618
National Trial Advocacy Competition – First Place Opening Statement (Tied)
Activities: Michigan Journal of Race & Law, *Executive Articles Editor (Vol. 29)*
Mock Trial, *Recruitment Chair 2022-2023*
National Lawyers Guild, *Events Chair 2022-2023*
MDefenders, *Member*

UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL — Chapel Hill, NC
Bachelor of Arts in Political Science, *with Honors and Distinction* – Minor in Persian Studies — May 2019
Honors: Col. Robinson Scholar, Honors Carolina Laureate, Hogan Fellowship
Activities: Criminal Justice Awareness and Action (CJAA), *Co-Chair*
Community Empowerment Fund (CEF), *Advocate*

EXPERIENCE

MECKLENBURG COUNTY PUBLIC DEFENDER — Charlotte, NC
Legal Intern — May 2023-Present

MICHIGAN LAW SCHOOL - JUVENILE JUSTICE CLINIC — Ann Arbor, MI
Student Attorney — January 2023-May 2023

- Served as defense counsel on 3 cases in juvenile court at various stages, before and after disposition
- Wrote and argued motions. Prepared resentencing letter for client on life without parole

FEDERAL COMMUNITY DEFENDERS FOR THE EASTERN DISTRICT OF MICHIGAN — Detroit, MI
Summer Law Clerk — June 2022 – August 2022

- Co-authored 55-page memo on legal implications of *Bruen* pertinent to federal defense attorneys
- Wrote motions and briefs including motion for pretrial release and motion to suppress

NEIGHBORHOOD DEFENDER SERVICE OF DETROIT — Detroit, MI
Investigator — September 2019 – July 2021

- Interviewed dozens of witnesses and clients, took written statements, collected records, served subpoenas, assembled mitigating evidence, analyzed evidence, and testified in trial
- Assisted in establishing investigative practices for the new holistic public defense office

THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA — Washington, DC
Investigative Intern — May 2018 – August 2018

- Assisted the Special Litigation Division's investigations for 3 clients' life without parole resentencing cases
- Interviewed witnesses and clients, collected and analyzed records, and edited legal documents

PUBLICATIONS

"This Call Is Being Recorded: AI Technologies' Impact on Jail Call Monitoring" — In Progress

- Student note being edited and prepared for potential publication

"Intersectional Encounters: Representative Bureaucracy and the Routine Traffic Stop" — February 2020

- Co-author of article published in *Policy Studies Journal*

"Justice by the Grid: Sentencing Disparities under NC's Structured Sentencing Policy" — March 2019

- Senior Honors Thesis completed with Dr. Frank Baumgartner

ADDITIONAL

Interests: Farmers' Market trips, Bob Ross-inspired oil painting, and UNC basketball

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Beyer,Luke A
Student#: 73601960

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	510	002	Civil Procedure	Richard Friedman	4.00	4.00	4.00	B+
LAW	530	001	Criminal Law	JJ Prescott	4.00	4.00	4.00	A-
LAW	580	002	Torts	Sherman Clark	4.00	4.00	4.00	B+
LAW	593	006	Legal Practice Skills I	Beth Wilensky	2.00		2.00	S
LAW	598	006	Legal Pract:Writing & Analysis	Beth Wilensky	1.00		1.00	S
Term Total				**GPA: 3.433**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.433**		**12.00**	**15.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
LAW	520	001	Contracts	Andrew Jordan	4.00	4.00	4.00	A-
LAW	540	001	Introduction to Constitutional Law	Leah Litman	4.00	4.00	4.00	B
LAW	594	006	Legal Practice Skills II	Beth Wilensky	2.00		2.00	S
LAW	660	001	Boundaries of Citizenship	Rebecca Scott	3.00	3.00	3.00	B+
Term Total				**GPA: 3.336**	**13.00**	**11.00**	**13.00**	
Cumulative Total				**GPA: 3.386**		**23.00**	**28.00**	

Continued next page >

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Beyer,Luke A
Student#: 73601960

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2022	**(August 29, 2022 To December 16, 2022)**							
LAW	480	001	MDefenders Public Defender Training Institute (Part I)	Eve Primus	2.00		2.00	S
LAW	639	001	Technology, Law, and Society	Sarita Schoenebeck	3.00	3.00	3.00	A
LAW	641	001	Crim Just: Invest&Police Prac	Eve Primus	4.00	4.00	4.00	A-
LAW	669	001	Evidence	Richard Friedman	4.00	4.00	4.00	A-
LAW	742	001	Film Law	Paul Szynol	3.00	3.00	3.00	A
Term Total				**GPA: 3.828**	**16.00**	**14.00**	**16.00**	
Cumulative Total				**GPA: 3.554**		**37.00**	**44.00**	
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	481	001	MDefenders Public Defender Training Institute (Part II)	Eve Primus	2.00		2.00	S
LAW	814	001	Law&Diplomacy: African Nations	Susan Page	2.00	2.00	2.00	A
LAW	863	001	Forensic Science and the Law	Imran Syed	2.00	2.00	2.00	A-
LAW	952	001	Juvenile Justice Clinic	Kimberly Thomas Katie Louras	4.00	4.00	4.00	A-
LAW	953	001	Juvenile Justice Clinic Sem	Kimberly Thomas Katie Louras	3.00	3.00	3.00	A
Term Total				**GPA: 3.836**	**13.00**	**11.00**	**13.00**	
Cumulative Total				**GPA: 3.618**		**48.00**	**57.00**	

Continued next page >

Control No: E197003401 Issue Date: 06/10/2023 Page 3

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Beyer,Luke A
Student#: 73601960

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2023	**(August 28, 2023 To December 15, 2023)**							
Elections as of:	06/10/2023							
LAW	536	001	Nat'l Security & Civ Liberties	Barbara Mcquade	3.00			
LAW	569	001	Legislation and Regulation	Daniel Deacon	4.00			
LAW	634	001	Water Wars/Great Lakes	Andrew Buchsbaum	3.00			
LAW	708	001	Local Government	Noah Kazis	4.00			

End of Transcript
Total Number of Pages 3

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University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

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The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

June 10, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I enthusiastically recommend Luke Beyer, a rising 3L at the University of Michigan Law School, for a clerkship in your chambers. Luke is a bright, efficient, and extremely capable law student who would be a fantastic law clerk.

Luke was a student of mine in the Winter 2023 semester of the Juvenile Justice Clinic, an experiential education course in which students participate in a seminar and also represent youth charged with or convicted of criminal offenses. About a month after starting the clinic, he and his partner had a deadline for pretrial motions and motions in limine, as well as jury instructions, on two juvenile delinquency cases for one client. Luke and his clinic partner dug into the case and prepared a motion to sever the two cases, a motion regarding discovery violations, and motions in limine to exclude evidence regarding a prior shooting on the day of the offense and a subsequent search of his client's residence after the client was in detention. Luke also started preparing for trial on this case until, soon after the motions hearings, it became obvious that the matter would settle. In his work for this client, Luke quickly grasped the facts of the cases, honed in on the salient details, and worked with the client to obtain additional information. His legal research was accurate and his writing was concise and to the point. He made good use of factual support as exhibits for his motions. His oral argument on the pleadings was direct and persuasive, while not overstating his position.

In addition to the work for this young client, Luke and his partner also represented other youth in delinquency cases, a prisoner challenging his life without parole sentence for a crime committed when he was 18 years old, and a formerly-incarcerated person reentering into the community. In every case, Luke's work was excellent. He was efficient with his time, and also did everything he could to advocate for his clients. In class, he was prepared and offered useful and insightful contributions.

I believe that Luke would be a productive clerk whose work can be trusted, even given the demands of your court. In my experience, he was able to produce thorough and well-researched pleadings under the deadlines of actual litigation and while also juggling the demands of being a student. He doesn't dither, as students sometimes do when faced with a new area of law or unfamiliar legal question. He gets the work done and done right.

At the end of the clinic seminar, we do a mock trial as a capstone experience, bringing in outside attorneys as judges and high school students as jurors. Although students typically work in teams of two, last year one team had to go head-to-head, which meant that each student would prepare the entire mock trial by themselves. I chose Luke and his partner because I thought they could handle twice the work and would also put in the needed effort. They did not disappoint me. Perhaps because this was his second set of motions in limine, he produced unusually thorough motions in limine for his mock trial, even without a partner to work with him.

Luke's academic record outside of the clinic reinforces my experience of him as a skilled and hard-working researcher, writer and new lawyer. Luke is the Executive Articles Editor on his journal, the Michigan Journal of Race & Law, and is working on a student note for potential publication.

Finally, Luke communicated effectively with a range of individuals. He was able to convey complex legal information to his teenage clients. Luke collaborated well with his clinic partner, supervisors, and the clinic staff, and also communicated effectively with opposing counsel and court personnel.

In sum, I strongly recommend Luke for a clerkship in your chambers. Please feel free to contact me at my cell phone, (734) 355-2599, if you would like to discuss his application.

Sincerely,

Kim Thomas
Clinical Professor
University of Michigan
(734) 647-4054; kithomas@umich.edu

FEDERAL COMMUNITY DEFENDER
Eastern District of Michigan
613 Abbott St., St. 500
Detroit, Michigan 48226
Telephone: **(313) 967-5542** ▪ ***Fax:*** **(313) 962-0685**

MICHAEL CARTER
Executive Director / Chief Counsel

AMANDA N. BASHI
Assistant Defender
(313) 967-5845
amanda_bashi@fd.org

May 2, 2023

Dear Judge,

It is with high regard that I recommend Luke Beyer for a clerkship in your chambers. Luke was an intern with the Federal Community Defender office in the summer of 2022. During his twelve weeks in our office, Luke stood out amongst his peers, demonstrating an understanding of legal nuance and a commitment to social justice.

You will likely receive letters full of adjectives and adverbs describing people like Luke as exceptional, goal oriented, strategic, and reliable. Luke is all of those things, but I would like to provide a few examples of how he stands apart.

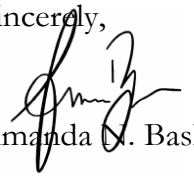
In addition to the typical work interns do at our office – researching and writing motions to suppress, motions for bond, and appellate issues – Luke led an intensive research project following the Supreme Court's June 2022 decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*. Leading a team of four students, Luke co-authored a lengthy memorandum about the history of American firearm regulations and the Second Amendment. The finished memorandum not only shaped our office's Second Amendment litigation strategy, but also served as a reference to federal defender offices across the country, all faced with a quickly-evolving legal landscape in federal gun cases. Luke's efforts on this project demonstrated his ability to work collaboratively, his astute research and writing skills, and his appreciation for intellectual and philosophical challenges. Luke invited feedback throughout the project, and applied suggestions to explore related research questions and incorporate useful findings into the finished product.

Luke was also an invaluable member of our defense team on a complicated drug and firearm case. He meticulously reviewed and cataloged thousands of pages of discovery as we prepared for trial. He helped to brainstorm investigation strategy, and even assisted in locating and interviewing witnesses. It is rare to work with someone who demonstrates such excellent people skills and rapport building alongside incisive legal research and writing abilities.

Beyond his intellectual and academic skills, Luke was a wonderful addition to our office environment. He was professional, respectful, and reliable. He listened intently, acted with care, and bolstered everyone around him to improve the work we do for our clients.

Luke's curiosity, diligence, and commitment to excellence will make him an exceptional law clerk. I also have no doubt that he will one day make a great advocate. Any time spent in your chambers will only make his future advocacy more effective. I confidently recommend Luke Beyer as a law clerk.

Sincerely,



Amanda N. Bashi

University of Michigan Law School
625 S. State St.
Ann Arbor, MI 48109

Eve Brensike Primus
Yale Kamisar Collegiate Professor of Law
ebrensik@umich.edu, 734.615.6889

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Luke Beyer will be a wonderful law clerk to whomever is fortunate enough to hire him. He is smart and hardworking. He is a gifted investigator, researcher, and writer. And he is an ambitious public defender who wants to use his law degree to help those who are less fortunate. I really can't say enough about Luke as a student, aspiring lawyer, and person, and I am thrilled to write this letter in support of his application.

I have had the pleasure of teaching Luke in two different courses during law school. First, he was a student in my introductory criminal procedure course. Even though there were almost 70 students in that class, Luke stood out as a classroom participant. It was clear that he cared about learning the doctrine, understanding the theory behind the doctrine, and thinking creatively about how to identify and fill in gaps in the doctrine. I knew that whenever I called on Luke I was sure to get analytically crisp and deep insights.

Luke's sharp intellect and writing skills were also apparent in his final examination. I gave students a three hour, in-class examination designed to test their abilities to spot and analyze legal issues. When answering issue-spotters, Luke's writing was systematic, logical, and clear. He was able to identify the issues quickly, address both sides of the argument, and formulate reasoned conclusions based on the governing case law. I particularly remember his answer to one of the big confession law questions. The question asked students to assess a fictional suspect's rights under Miranda, Massiah, and the voluntariness doctrine. Luke not only spotted all of the relevant issues, but he wrote with wonderful clarity and organization. I have no doubt that you would find Luke's writing abilities to be incredibly useful to you in chambers.

That said, Luke is so much more than a really smart law student and great writer. He is also a wonderful investigator and researcher and an incredible advocate, which I learned when he enrolled in the Public Defender Training Institute that I run at Michigan Law. As a former public defender myself, I created the Training Institute to be a year-long immersion into the world of indigent defense for aspiring defenders. It teaches students the foundational pretrial and trial advocacy skills necessary to be zealous, client-centered advocates. There are sessions on the role of a public defender, how to handle the challenges that public defenders face (including excessive caseloads, secondary trauma, and ethical issues) as well as sessions on effective pretrial preparation (including client interviewing, investigation, taking witness statements, obtaining discovery, storytelling and persuasion, initial appearances, preliminary hearings, and the development of the defense theory of the case) and trial advocacy (including an introduction to evidence, motions practice, plea bargaining, voir dire, opening statements, direct and cross examinations, closing statements, and sentencing advocacy). Luke was one of sixteen students enrolled in the Institute this past year and one of only three 2Ls selected to participate. During Institute sessions I got to work one-on-one with Luke and saw firsthand his intellect, creativity, and natural advocacy skills.

Luke is a gifted storyteller and public speaker. I was not surprised to learn that he tied for first place in a National Trial Advocacy Competition. Luke was one of the hardest working people in the Institute. He is a dogged investigator and researcher who will leave no stone unturned. I still remember when I asked students to investigate and get witness statements for a case. Luke was far away the best in the class. Perhaps it was because of his training and work as a criminal investigator for the Neighborhood Defender Service of Detroit, but I think some of it is just who Luke is. When presented with a problem or case, Luke wants to understand and get answers and is willing to dig to find them. His persistence and creativity – coupled with his raw skills – will make him an incredible law clerk when difficult, thorny issues come through chambers. He will pay meticulous attention to detail and be thorough and exhaustive in his research of a problem.

Whether I was giving the students investigation-focused simulations or having them research state discovery laws to make pretrial motions to compel, Luke was always on top of the research and able to deftly weave the law into his motions and presentations. Luke brings an incredible work ethic to all of his endeavors and would be a real asset to you in chambers.

As part of the Institute, I also got to see Luke's kindness, his passion for helping the underprivileged, and his infectious positive attitude. Everyone in the Institute loved him. He is an incredible team player and the kind of leader that others aspire to be. It

would be a joy to have Luke in chambers each day.

Luke would also come to your chambers with knowledge of how both state and federal systems operate. He will have worked in two different state public defender systems – one in Detroit and one in Mecklenburg, North Carolina – in addition to having worked for the Federal Community Defenders for the Eastern District of Michigan and for the Public Defender Service in Washington D.C. I have no doubt that Luke would be able to hit the ground running in any chambers.

As I hope this letter conveys, I really cannot say enough about Luke. I think he is terrific and would be a wonderful law clerk. Please do not hesitate to contact me should you have any questions or should you require any additional information.

Sincerely,

Eve Brensike Primus

Eve Brensike Primus - ebrensik@umich.edu - 734-615-6889

Luke Beyer
1018 Granger Ave., Ann Arbor, Michigan 48104
(919) 886-2381 • labeyer@umich.edu

Writing Sample

I prepared this brief in support of a motion to suppress during the summer of 2022 while I was interning with the Federal Community Defender of the Eastern District of Michigan. I have permission to use this as a writing sample. This draft is not the version of the brief that was ultimately filed with the court. The version of this brief that was filed with the court was edited by my supervising attorney after I left the internship, and I never saw that draft. I wrote the first version of this brief with light assistance from a separate brief based on different facts and issues written by an attorney at the Federal Defender office. I utilized that version as a starting template. This is an edited version of my first draft, and I did that editing by myself this year. I have omitted the motion to suppress, exhibits, the poisonous fruits section of the analysis, and still images of surveillance video footage for brevity and file size.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 22-CR-20320

Hon. Terrence G. Berg

DEANTAE MCCANTS,

Defendant.
_____/

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS

I. INTRODUCTION

Four police officers boarded the Greyhound bus. The officers escorted Mr. McCants to the front of the bus. Two of the officers grabbed Mr. McCants' hands and held them behind his back. Mr. McCants was handcuffed and held outside the bus for over six minutes until he was taken to a different section the Greyhound Bus Station for a law enforcement canine search. His bus was about to depart, and it seemed entirely certain that Mr. McCants would miss his bus. With this extreme show of force by the police, it is clear that Mr. McCants was under arrest.

However, the officers lacked the necessary probable cause to arrest Mr. McCants. The officers' only support for this drastic action were Mr. McCants' arrival at the bus station five minutes prior to his bus's departure, his alleged nervous appearance, and his proximity to someone who was later found with illegal narcotics on their person.

The arrest of Mr. McCants without probable cause was an unlawful violation of his Fourth Amendment rights. Additionally, even if the seizure of Mr. McCants was only an investigatory *Terry* stop, the police did not have the necessary reasonable suspicion that Mr. McCants was involved in a crime. Because Mr. McCants and his belongings were seized unconstitutionally, all evidence stemming from the seizure of Mr. McCants should be suppressed. Mr. McCants' statement to officers should be suppressed as bad fruit of the illegal seizure.

II. FACTUAL BACKGROUND

On June 14, 2022 at approximately 6:35 p.m.[1], Deantae McCants arrived at the Greyhound Bus Station for a 6:40 p.m. bus to Louisville Kentucky. The bus to Louisville had just begun boarding two minutes prior to when Mr. McCants arrived at the bus station. Mr. McCants walked through the bus station to the platform, and walked towards the line to get on the bus. Under ten seconds after Mr. McCants and another man, later identified as Terry Holland, stepped onto the bus platform, a police officer approached Mr. McCants and Mr. Holland. The officer asked them for their tickets. Mr. McCants immediately produced his ticket on his phone and handed his

[1] Timestamps on surveillance camera footage from the Greyhound Bus Station are inaccurate based on police report and bus schedule. Officers claim in Exhibit A that Mr. McCants arrived at 6:35 p.m. Mr. McCants arrived at the bus station just two minutes after boarding started. The Greyhound Bus Station website states that "boarding begins up to 20 minutes before departure time." *Bus Travel FAQs*, Greyhound, https://www.greyhound.com/en/help-and-info/travel-info/bus-travel-faqs (last visited Aug. 9, 2022).

phone to the officer. The officer verified Mr. McCants' ticket, returned his phone, and asked for his photo ID. Mr. McCants pulled out his ID, and handed it to the officer. The officer reviewed Mr. McCants' ID, returned it, and permitted Mr. McCants to board the bus.

While Mr. McCants boarded the bus, the officer continued to question Mr. Holland. Five officers surrounded Mr. Holland and identified that he had a warrant for his arrest. Mr. Holland was placed in handcuffs, and he set his backpack on the ground. The officer searched Mr. Holland's person, and removed an object from his person. Immediately, the other four police officers boarded the bus. The image below shows the four officers boarding the bus to seize Mr. McCants.

[IMAGE OMITTED FOR FILE SIZE ON OSCAR]

Mr. McCants was escorted off the bus. At the top of the bus stairs, two officers restrained Mr. McCants by holding his hands behind his back. The image below shows two officers holding Mr. McCants' arms behind his back while he exits the bus.

[IMAGE OMITTED FOR FILE SIZE ON OSCAR]

The officers holding Mr. McCants' right arm drops Mr. McCants' backpack on the ground. The other officer holding Mr. McCants' left arm sets what appears to be Mr. McCants' phone on the counter by the bus and goes inside the bus station. The officer holding Mr. McCants' right arm takes control of both of Mr. McCants' arms and places him in handcuffs. The officer pats Mr. McCants' legs, searching his person.

Approximately two minutes later, the officer reaches into Mr. McCants' pocket, pulls something out, and places it on the counter.

After a few more minutes of the other officer searching Mr. Holland, the two officers take Mr. Holland and Mr. McCants to a different section of the bus station out of view of the cameras for a law enforcement canine sniff.

Later, Mr. McCants was interviewed by the FBI and provided a statement to the agent. The next day, Special Agent Cioma filed a complaint charging Mr. McCants and Mr. Holland with possession of controlled substances and conspiracy to distribute controlled substances under 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846.

III. LEGAL STANDARD

The Fourth Amendment protects "the people" from "unreasonable searches and seizures." U.S. Const. Amend IV. "[T]he Amendment stands as an essential bulwark against arbitrary and unreasonable governmental intrusion—whatever its form, whatever its purpose—upon the privacy and liberty of the individual …" *United States v. Dionisio*, 410 U.S. 19, 42 (1973) (Marshall, J., dissenting).

The Sixth Circuit identifies three types of police-citizen encounters that are permissible under the Constitution: "(1) the consensual encounter, which may be initiated without any objective level of suspicion; (2) the investigative detention, which if non-consensual, must be supported by a reasonable articulable suspicion of criminal activity; and (3) the arrest, valid only if supported by probable cause." *United States v. Waldon*, 206 F.3d 597, 602 (6th Cir. 2000) (internal quotation marks omitted). A seizure

occurs when, "taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (internal quotation marks omitted); *United States v. Buchanon*, 72 F.3d 1217 (6th Cir. 1995). Examples of circumstances that might indicate a seizure include: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language of tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

An arrest does not require formal words or booking at a police station. *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir.1977). Rather, an arrest occurs when there is a "deprivation of liberty under the authority of law." *Id.* For an arrest to be legally valid, officers must have probable cause. *United States v. Avery*, 137 F.3d 343, 352 (6th Cir.1997). The Supreme Court has stated that there is not a test for probable cause that is precisely defined or quantifiable. *Fla. v. Harris*, 568 U.S. 237, 243 (2013). Rather, probable cause must be evaluated using common sense and viewing the totality of the circumstances. *Id.* at 244. Probable cause exists where the "facts and circumstances within the officer's knowledge [ ] are sufficient to warrant a prudent person ... in believing ... that the suspect committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979).

The Fourth Amendment does "[allow] a police officer to briefly detain a person [] for investigative purposes if the officer has a reasonable suspicion, supported by articulable facts, that criminal activity has occurred or is about to occur." *United States v. Davis*, 430 F.3d 345, 354 (6th Cir. 2005); see also *Terry v. Ohio*, 392 US 1 (1968). The officers' suspicion, however, must be based on "more than a hunch…" *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). The officer must have a particular and objective basis and must be able to provide articulable facts which give rise to a reasonable suspicion that the *specific* person is involved in criminal activity. *United States v. Keith*, 559 F.3d 499, 503 (6th Cir. 2009). Reasonable suspicion is a lower standard than probable cause. *Florida v. J.L.*, 529 U.S. 266, 272 (2000).

The Supreme Court has refused to establish a bright line rule about when an investigatory stop becomes an arrest. *United States v. Sharpe*, 470 U.S. 675, 685 (1985). However, the length and manner of the stop must be reasonably related to basis of initial intrusion. *United States v. Palomino*, 100 F.3d 446, 449 (6th Cir.1996). A seizure may be considered an arrest "when a detention is 'in important respects indistinguishable from a traditional arrest.'" *United States v. Hardnett*, 804 F.2d 353, 356 (6th Cir. 1986). The Sixth Circuit has refused to establish a litmus test for when a seizure exceeds the bounds of an investigative stop. *Id.* The Sixth Circuit does focus on two factors to determine if a seizure was an investigatory stop focusing on the totality of the circumstances. *Id.* First, the court examines whether there was a proper basis for the stop by looking at whether the officers were aware of specific and articulable facts that

gave rise to reasonable suspicion. *Id.* The second factor is "whether the degree of intrusion into the suspect's personal security was reasonably related in scope to the situation at hand..." *Id.* The use of handcuffs does not automatically make a seizure an arrest, but this display of force must be warranted. *Brown v. Lewis*, 779 F.3d 401 (6th Cir. 2015).

IV. ANALYSIS

A. Mr. McCants was seized for purposes of the Fourth Amendment.

Mr. McCants was seized for the purposes of the Fourth Amendment because "a reasonable person would have believed he was not free to leave." *Id.* Four police officers boarded the bus. Two officers grabbed Mr. McCants' arms as he was being removed from the bus. Once he had been taken outside, he was handcuffed. In *United States v. Grant*, the court stated that "a passenger seated in the cramped interior of a Greyhound bus…, confronted by a police officer who boarded the vehicle and began to ask questions and review identification papers, would not feel free to walk away." 920 F.2d 376, 381 (6th Cir. 1990). Similarly, here Mr. McCants, sitting in a Greyhound bus confronted by multiple police officers, would not have felt free to walk away.

The officers also took Mr. McCants' backpack and phone. The police's seizure of Mr. McCants' phone meant that he lost access to his bus ticket. Confiscating someone's transportation ticket indicates to the person that they are not free to leave. *Fla. v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). The seizing of Mr. McCants' ticket and his removal from the bus indicated to him that he would likely miss

his bus and would not be able to leave the police encounter. There was no opportunity for Mr. McCants to decline the interaction and "ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437. Indeed, no reasonable person under these circumstances could ignore the police presence and "go about his business," i.e., remain in the bus as intended.

Considering the totality of the circumstances, Mr. McCants was seized for purposes of the Fourth Amendment when officers forcibly removed him from the bus.

B. Mr. McCants' seizure amounted to an arrest.

The seizure of Mr. McCants exceeded the scope of an investigatory *Terry* stop, amounting to an arrest. A determination that a person was arrested does not depend on formal words or booking at a police station. *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977). Rather, arrest only requires "the deprivation of liberty under the authority of law." *Id.* The Supreme Court has declined to create a per se rule to distinguish whether a seizure amounted to an arrest. *United States v. Richardson*, 949 F.2d 851, 857 (6th Cir. 1991). In *Richardson*, the Sixth Circuit looked to three standards for distinguishing an investigatory *Terry* stop from an arrest. *Id.* First, the court looked to factors "such as the transportation of the detainee to another location, significant restraints on the detainee's freedom of movement involving physical confinement or other coercion preventing the detainee from leaving police custody, and the use of weapons or bodily force in distinguishing a *Terry* stop from an arrest." *Id.* Second, the court in *Richardson* examined the factors laid out in *Grant*, "(1) the conduct of the police,

(2) the characteristics of the particular defendant, and (3) the physical surroundings of the encounter." *Id.* (summarizing *Grant*, 920 F.2d 376). Finally, the court in *Richardson* also looked to the objective test laid out in *Knox*, whether "a reasonable person in the defendant's position [would] have felt that he was under arrest or was 'otherwise deprived of his freedom of action in any significant way.'" *Id.* (quoting *United States v. Knox*, 839 F.2d 285 (6th Cir. 1988)).

In *Royer*, the Supreme Court determined that the defendant was arrested rather than detained for an investigatory *Terry* stop because the defendant was questioned in a separate office, law enforcement retained the defendant's plane ticket, law enforcement retrieved the defendant's luggage without his consent, and law enforcement failed to inform the defendant that he was free to leave. *Florida v. Royer*, 460 U.S. 491 (1983). Similarly, here Mr. McCants was moved to a separate location for questioning off of the bus, his phone with his ticket was taken from him, his bag was taken from the bus, and law enforcement did not inform him that he was free to leave.

The defendant in *Richardson* was also found to have been arrested because of his transportation from his own car to the back of a police car. 949 F.2d 851, 857-58 (6th Cir. 1991). Additionally, the officer testified that the defendant was not free to leave, and he would have been restrained if he tried to walk away. Here, Mr. McCants was transported off the bus to a separate location and the use of handcuffs and police force on his body would have demonstrated that he was not free to leave.

A reasonable person in Mr. McCants' position would have felt that they were under arrest. Four officers boarded the bus to remove Mr. McCants from the bus. Two officers placed their hands on Mr. McCants, forcibly removing him from the bus that was about to depart. They took his luggage and his phone that contained his ticket, and they placed him in handcuffs near the other man who was under arrest. For these reasons, Mr. McCants had been placed under arrest.

C. The arrest of Mr. McCants was unlawful because law enforcement lacked probable cause.

An arrest without probable cause is a violation of the Fourth Amendment. *Smith v. City of Wyoming*, 821 F.3d 697, 714 (6th Cir. 2016). The standard for probable cause is a based on the totality of the circumstances and is a "practical and common-sensical standard." *Florida v. Harris*, 568 U.S. 237, 244 (2013). A determination of probable cause requires that the "facts and circumstances within the officer's knowledge [] are sufficient to warrant a prudent person... in believing… that the suspect committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).

Officers lacked probable cause to arrest Mr. McCants because a prudent person with the officers' knowledge would not believe that Mr. McCants was committing a crime. The officers' only bases for the seizure of Mr. McCants were that he arrived at the bus not long before it was scheduled to depart, he allegedly looked nervous when

he saw the police officers, and he was proximate to someone who was later found to be possessing controlled substances.

First, proximity to someone suspected of committing a crime does not amount to probable cause. In *Sibron*, the Supreme Court held that the officer lacked probable cause to search the defendant simply on the basis that he had spoken with people that the officer knew to be addicted to heroin. *Sibron v. New York*, 392 U.S. 40, 62 (1968). Similarly, in *Ybarra* the search of the defendant was found to be unlawful because the officer lacked probable cause. *Ybarra v. Illinois*, 444 U.S. 85, 86 (1979). "Mere propinquity to others independently suspected of criminal activity does not, without more give rise to probable cause to search someone." *Id.* While the officers in *Ybarra* had a warrant to search the bar, they lacked probable cause to seize and search the patrons in the bar because there was no individualized reason to believe that they were involved in the alleged criminal activity. *Id.* at 90. Here, the Michigan State Police report stated only that Mr. McCants and Mr. Holland "appeared to be travel companions." Exhibit A at 2. Officers were not certain that they were in fact travel companions. Even if Mr. McCants and Mr. Holland had been travel companions, *Sibron* and *Ybarra* demonstrate that interaction with someone who commits a crime does not lend itself to probable cause that the individual is involved in criminal activity.

In *United States v. Moore*, the Sixth Circuit held that there was no probable cause for officers to search the defendant because the officer had no evidence that tied the defendant to the drugs that were alleged to have been in the car as opposed to the driver

of the car. 390 Fed.Appx. 503, 507 (6th Cir. 2010). Similarly, here officers had no evidence that tied Mr. McCants to Mr. Holland's narcotics.

Second, Mr. McCants' arrival at the bus station five minutes prior to the bus' departure does not lend itself to criminal activity. In *Reid v. Georgia*, the Supreme Court held that the defendant arriving early to the airport was not supportive of reasonable suspicion because it was consistent with innocent travel activity. 448 U.S. 438, 441 (1980). Boarding a Greyhound Bus does not require a very early arrival time. In fact, Mr. McCants arrived at the bus platform while the bus was still boarding. He may not have arrived early, but he certainly arrived on time to board the bus. Mr. McCants' arrival time at the bus station is consistent with Greyhound's own instructions. The Greyhound website's FAQ page instructs passengers that "if you have your ticket and are traveling with carry-on bag only, just be at the gate at your boarding time." *Bus Travel FAQs*, Greyhound, https://www.greyhound.com/en/help-and-info/travel-info/bus-travel-faqs (last visited Aug. 9, 2022). Mr. McCants' on-time arrival should therefore similarly not give weight to reasonable suspicion or probable cause.

Finally, the officers contend that when Mr. McCants and Mr. Holland moved outside and saw the police officers, they "had a visible break in their stride, with their eyes widened and a startled look come over their face… [and Mr. McCants] suddenly looked away and down at the ground in nervous reaction, breaking eye contact." Exhibit A at 2. The video evidence does not support the officer's description of Mr. McCants' alleged nervousness. Only ten seconds elapse between Mr. McCants entering the bus

platform and the beginning of the interaction with the officer. Even if Mr. McCants did appear nervous, "nervousness is entirely consistent with innocent behavior." *United States v. Andrews*, 600 F.2d 563, 566 (6th Cir. 1979). Additionally, there are other reasons why someone would look nervous when they see police. Courts have noted that "given the tensions between the black community and the police…, any nervousness exhibited by [the black defendants] was understandable." *United States v. Jordan*, 2017 WL 9516819 (W.D.N.Y. 2017).

"Ambiguous behavior does not give rise to reasonable suspicion because 'reasonable suspicion looks for the exact opposite of ambiguity." *United States v. Young*, 707 F.3d 598, 603 (6th Cir. 2012) (quoting United States v. Beauchamp, 659 F.3d 560, 571 (6th Cir. 2011)). Because probable cause is a higher standard than reasonable suspicion, *J.L.*, 529 U.S. at 272, the inability of ambiguous behavior to give rise to reasonable suspicion also means that ambiguous behavior cannot give rise to probable cause. The facts known by the officers at the time of the arrest of Mr. McCants were filled with ambiguity. Therefore, officers lacked probable cause to arrest Mr. McCants, and the arrest was therefore unlawful.

D. Even if the seizure of Mr. McCants was a *Terry* stop, the seizure was unlawful because officers did not have reasonable suspicion that he had committed a crime.

If the Court were to find that the police merely conducted an investigatory *Terry* stop of Mr. McCants, his Fourth Amendment rights would still have been violated

because officers lacked reasonable suspicion. Reasonable suspicion is a lower standard than probable cause, but "there must be at least a minimal level of objective justification for the stop." *Wardlow*, 528 U.S. 119, 123. An officer's mere hunch is insufficient for a finding of reasonable suspicion. *United States v. Arvizu*, 534 U.S. 266 (2002).

All that the officers knew at the time of the seizure was that Mr. McCants *may* have been traveling with Mr. Holland, he arrived at the bus station shortly before his bus departed, and he allegedly looked nervous when he saw the police officers.

As discussed above, Mr. McCants' alleged nervous behavior is not evidenced by the video footage and is subject to many alternative explanations. Similarly, Mr. McCants' allegedly late arrival at the bus station is permissible, subject to many alternative explanations, and even in line with the Greyhound bus website. These ambiguous behaviors are insufficient for a finding of reasonable suspicion. *Young*, 707 F.3d 598, 603 (6th Cir. 2012) They therefore cannot give rise to reasonable suspicion.

Officers relied heavily on Mr. McCants' proximity to Mr. Holland, who was found to be in possession of narcotics. As previously stated, officers did not know if Mr. McCants was traveling with Mr. Holland. *See* Exhibit A at 2. Officers saw two young Black men walking near each other towards the same bus and assumed that they were traveling companions. Even if officers did know that Mr. McCants and Mr. Holland had been traveling together, there is no indication that Mr. McCants would have been involved in Mr. Holland's illicit activity. As *Ybarra* instructs "mere propinquity to others independently suspected of criminal activity does not, without more give rise to

probable cause to search someone." 444 U.S. 85, 86 (1979). Here, the only additional reasons for the stop are ambiguous and not indicative of criminal activity. For these reasons, officers lacked reasonable suspicion to conduct a *Terry* stop of Mr. McCants.

E. The search of Mr. McCants' person, the search of his belongings, and his statement to officers must be suppressed according to the exclusionary rule.

[Section omitted for brevity]

V. Conclusion

For the reasons stated, Mr. McCants respectfully requests this Honorable Court suppress the evidence seized and the statement taken because of the unconstitutional seizure of his person.

Respectfully submitted,

FEDERAL COMMUNITY DEFENDER

s/Colleen Fitzharris
Counsel for Mr. McCants
613 Abbott, Suite 500
Detroit, MI 48226
313-967-5846
Colleen_Fitzharris@fd.org

Dated: June 11, 2023

Applicant Details

First Name	**Manpreet**
Middle Initial	**K**
Last Name	**Bhandal**
Citizenship Status	**U. S. Citizen**
Email Address	**mbhan5396@uchastings.edu**
Address	**Address** Street **1190 Mission St. Apt. 413** City **San Francisco** State/Territory **California** Zip **94103** Country **United States**
Contact Phone Number	**714-348-1459**

Applicant Education

BA/BS From	**California State Polytechnic University, Pomona**
Date of BA/BS	**May 2020**
JD/LLB From	**University of California, Hastings College of the Law** **http://uchastings.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**20%**
Law Review/Journal	**Yes**
Journal(s)	**Hastings Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Stewart, Therese
Therese.Stewart@jud.ca.gov
415 865-7350
Wall-Cyb, Teresa
wallcybteresa@uchastings.edu
Marcus, Richard
marcusr@uchastings.edu
(415) 565-4829

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Manpreet K. Bhandal
1190 Mission St, #413 • San Francisco, CA 94103 • (714) 348-1459 • mbhan5396@uchastings.edu

May 20, 2023

The Honorable Judge Juan R. Sánchez,
United States District Court, Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Sánchez,

I am a rising third-year student at UC Hastings College of the Law, San Francisco. I am writing to express my strong interest in a clerkship position in your courtroom. After a summer judicial externship with The Honorable Justice Therese Stewart at the California Court of Appeal, I became interested in becoming a judicial clerk. I will be joining Perkins Coie this summer as a summer associate and hope that I can bring my experience from Perkins to your chambers.

During my second year of law school, I served as a staff editor on the Hastings Law Journal. In this role, I not only improved my writing skills by editing articles from practitioners, professors, and talented law students, I also wrote a journal note. My note explored the death penalty and its implications on the criminal justice system. I was also a teaching assistant in a writing centered Constitutional Law class where I had the opportunity to edit student work, further honing my writing skills. Last summer, while externing for Justice Therese Stewart, I authored a judicial opinion focusing on tort law in California. This allowed me to gain substantive research experience while also allowing me to work closely with Justice Stewart to improve my writing. This Fall, I will also be doing the Mediation Clinic at Hastings, which will allow me to mediate disputes in San Mateo Superior Court and the San Francisco Human Rights Commission. In addition, I will serve as the Supreme Court of California editor for the Hastings Law Journal and work closely with the California Constitution Center to write articles on constitutional issues affecting California.

Working at your chambers aligns well with my longstanding commitment to public service. I have enjoyed serving on multiple student organizations while in law school and working collaboratively with my peers and other professionals. I am also part of the Judicial Internship Opportunity Program and serve as one of the regional mentors for the program, connecting students with resources during their judicial externships.

My writing skills, record of academic excellence, and proven success in leadership roles have prepared me well for the rigors of working in your chambers. Thank you for taking the time to consider my candidacy.

Respectfully,

Manpreet K. Bhandal

Manpreet K. Bhandal

Manpreet K. Bhandal

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EDUCATION

University of California, Hastings College of the Law, San Francisco, CA
Juris Doctor Candidate, May 2024
GPA: 3.541 (Top 15% = 3.593)

- Hastings Law Journal, *Executive Supreme Court of California Editor*
- Legal Research & Writing II, *Best Oralist*
- Chancellor's Diversity and Equity Inclusion Working Group, *1L Student Member*
- South Asian Law Student Association, *Vice President of Alumni Relations*
- First-Generation Professionals, *Secretary*

California Polytechnic State University, Pomona, CA
Bachelor of Arts, History, May 2020

- Asian Islander Student Center, *Social Justice Leader*
- African American Student Center, *Diversity Ambassador*
- Sikh Student Association | History Club, *President*

EXPERIENCE

Mediation Clinic, San Francisco, CA
Student Mediator, Fall 2023

Perkins Coie, San Francisco, CA
Summer Associate, Summer 2023

Justice Therese Stewart, California Court of Appeal, First Appellate District, San Francisco, CA
Judicial Extern, Summer 2022

- Authored a judicial opinion on local tort law
- Planned meetings with Justice Stewart to discuss oral arguments
- Researched California Evidence Code issues pertaining to family law cases

Tsang and Associates, Artesia, CA
Legal Intern, Winter 2020

- Conducted and summarized intake interviews with new clients for immigration practice
- Researched and drafted waivers to stay deportation proceedings
- Collaborated with attorneys on filings and participated in strategy meetings

Subway, La Habra, CA
Manager, 2017-2020

- Created and adjusted work schedules for 10 employees
- Planned and revised delivery schedules based on special events and regular course of business
- Resolved issues with daily operations to ensure customer satisfaction and employee retention

United Sikh Movement, Riverside, CA
Southern California Coordinator, Summers 2016, 2017, 2018, 2019

- Initiated creation of Sikh Student Association chapters across college campuses
- Identified fundraising sources, developed ideas for events, and gave toolkit presentations.

LANGUAGES & INTERESTS

- Fluent in Punjabi and Hindi
- Enjoy Chinese Song Dynasty poetry, Gurmukhi calligraphy, and Tolstoy novels

Printed: 01 Jun 2023 Page: 1 of 1

University of California
College of the Law, San Francisco

NAME: Manpreet Kaur Bhandal
Academic Program: JD

ID No.: 0593601

21/FA FALL 2021									
CIVIL PROCEDURE	105	15	A-	R	4.0	4.0	14.80		
CONTRACTS	110	15	A-	R	4.0	4.0	14.80		
TORTS	130	15	B	R	5.0	5.0	15.00		
LEGAL RESEARCH & WRITING I	131	58	A-	R	3.0	3.0	11.10		
					16.0	16.0	55.70	3.481	3.481
22/SP SPRING 2022									
CRIMINAL LAW	115	25	B+	R	4.0	4.0	13.20		
PROPERTY	125	25	A-	R	5.0	5.0	18.50		
LEGAL RESEARCH & WRITING 2	970	30	B+	R	3.0	3.0	9.90		
CONST. LAW 1: LAW & PROCESS	122	21	A	R	4.0	4.0	16.00		
					16.0	16.0	57.60	3.600	3.541
22/FA FALL 2022									
ANTITRUST	240	11	B+	I	3.0	3.0	9.90		
CRIMINAL PROCEDURE	328	13	A-	I	4.0	4.0	14.80		
EMPLOYMENT LAW	435	11	B+	I	3.0	3.0	9.90		
LEGAL ETHICS: PRACTICE OF LAW	490	11	A-	I	3.0	3.0	11.10		
CAPITAL PUNISHMENT SEMINAR	770	11	B+	I	2.0	2.0	6.60		
WRITING REQ'T FOR LAW770	998	09	M	N	0.0	0.0	0.00		
JOURNAL MEMBERSHIP	985	11	CR	N	1.0	1.0	0.00		
					16.0	16.0	52.30	3.487	3.523
23/SP SPRING 2023									
STAT:LEGIS & ADMIN REGULATION	184	21	B-	R	3.0	3.0	8.10		
CIVIL PROCEDURE 2	275	21	B	I	3.0	3.0	9.00		
EVIDENCE	368	22	A-	I	4.0	4.0	14.80		
FEDERAL COURTS	376	21	B+	I	3.0	3.0	9.90		
JOURNAL MEMBERSHIP	985	21	CR	N	1.0	1.0	0.00		
TEACHING ASSISTANT	980	07	CR	N	1.0	1.0	0.00		
					15.0	15.0	41.80	3.215	3.457

C U M U L A T I V E T O T A L S

Cred. Att.	Cred. Cpt.	GPA Cred.	Grade Pts.	GPA
63.00	63.00	60.00	207.40	3.457

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in support of Manpreet Bhandal's application for a
clerkship with your chambers. Manpreet served as an extern in my chambers during the summer of 2022, and I found her thoroughly delightful for many reasons.

First, Manpreet is a strong writer and analytical thinker. She was a rising 2L at the time and so had only one year of law school under her belt. Yet she had mastered basic research and writing skills and was developing strong legal reasoning skills. I had her work with her fellow intern on an appeal in a tort case in which summary judgment had been granted and the issues were both legal and factual. The case involved sovereign immunity statutes that limit tort liability for government entities. The law itself was complex for the externs, and the summary judgment procedure added to the complexity. Manpreet and her fellow extern worked together on the project and prepared both outlines and drafts of the opinion, which proved very helpful to me. The quality of Manpreet's work was very good and she was a
dedicated individual who gave her all to the externship.

Second, Manpreet was open to feedback and to learning. She is a good listener, does not take critique as criticism and she absorbs what she learns and uses it.
Third, Manpreet has a wonderful personality. She is thoughtful, deliberate and unusually mature for a person her age. She has a quiet self-confidence that is coupled with genuine humility. She worked exceptionally well with her fellow extern and is a good team player. I worked with her directly and enjoyed her company that summer. She was working in the courthouse and spent significant time in chambers with me, which was a welcome respite from COVID-related distancing. Her warmth
and thoughtful demeanor were a balm during a trying time.

In short, Manpreet has the skills and temperament to make an excellent law clerk, and I am confident she will be of great assistance to the judge or judges who hire her. Please feel free to contact me if you would like additional information.

Very truly yours,

Therese M. Stewart

Therese Stewart - Therese.Stewart@jud.ca.gov - 415 865-7350

Teresa Wall-Cyb
Lecturer in Law
Legal Research and Writing

UC Hastings Law | 100 McAllister Street | San Francisco, CA 94102 | cell phone 415.350.3161
www.uchastings.edu | wallcybteresa@uchastings.edu

March 13, 2023

Dear Judge,

I am honored to write this recommendation on behalf of Manpreet Bhandal. She will be an exceptional judicial clerk because she is an effective problem-solver, an excellent writer, and an engaged, productive collaborator who works with high integrity and a growth mindset. I have known her as a student in my legal research and writing course and as a leader on campus. I am grateful to have had the good fortune to work with this extraordinary law student. I give her my highest recommendation for a clerkship.

Ms. Bhandal is a disciplined problem-solver who employs sharp attention to detail and a commitment to useful processes. She asks great questions and remains curious as she works through legal problems. She moves toward the difficult parts of a problem, establishes comfort with the technical aspects of the law and how to explain it, and thrills to crafting solutions. Likewise, she is a studious writer who came to law school with strong narrative and analytical skills. She maintained a fluid, yet precise style as she adapted quickly to the solid structure of legal writing. Her work is efficient and a pleasure to read.

As a student in my legal writing class, she was uncommonly good because she engaged with both the course material and her peers. She embraced challenging concepts with sincere interest and in so doing, she developed expertise in many researching and writing skills. In addition to her contributions to class discussion and oral argument practices, her integrity and kindness lifted class performance. Overall, last year's students produced stronger papers than past groups. Ms. Bhandal's contributions to class and willingness to coach her peers as she gained understanding had a strong impact on student improvement.

It is no surprise that Ms. Bhandal was selected as the Supreme Court of California Articles Executive Editor for the UC Law SF Journal. She has the necessary leadership and technical abilities in spades. I also have no doubt that she will balance this position with her schoolwork and clerkship at Perkins Coie. Ms. Bhandal enjoys a challenge, and I have met few people in or outside the law school who can match her grace as she moves through it all.

Finally, Ms. Bhandal is particularly adept at overcoming challenges because of her growth-oriented mindset. She is a first-generation law student who has made her own way to a professional career since high school. She makes no excuses and sees mistakes as opportunities. This mindset keeps her open to taking the kinds of intellectual risks that will be valued in the court. I recommend Ms. Bhandal highly for a clerkship, and I welcome additional requests for information to support her application.

Truly yours,

Teresa Wall-Cyb

June 07, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Manpreet Bhandal, who is completing her second year of law school here, is applying to be your law clerk after graduation. She has asked me to write in support of her application, and I am happy to do so because she has been a very good student and is an exemplary of our community.

Ms. Bhandal was a student in my Civil Procedure I course in her first semester of law school. Students typically find this course difficult because it deals with topics they have not addressed previously and they find these topics rather dry and abstract. Ms. Bhandal was not like that. Instead, she was engaged throughout the semester and a frequent contributor in class. On the final exam (with essay questions modeled on recent court decisions), she did an excellent job, receiving an A- for the course. She got similar grades in her other courses.

She has also chosen courses that should prepare her to be an outstanding law clerk. Right now, she is in my Civil Procedure II course, and also in Federal Courts and Evidence. Last semester, she took Antitrust, Criminal Procedure, and Employment Law, all courses that cover topics a law clerk should know about. In my Civil Procedure II class, as during her first year, Ms. Bhandal has been an active participant in class discussions.

So she has a very good and broad-based law school record. She's also an editor on the Hastings Law Journal. She was recognized as Best Oralist in Legal Writing and Research. And she has been a real standout in community service -- serving as a student member of a law school working group, and vice president of two student associations -- the American Constitution Society and the South Asian Law Student Association. In this, she is carrying forward on her outstanding extracurricular work from pre-law school days, including serving then as President of a student association and additionally serving on other associations.

Perhaps more pertinently, she already has law clerk experience, having served during Summer 2022 as a judicial extern to Justice Therese Stewart of the California Court of Appeal.

On top of all that, she's a really nice person, exactly the sort of person you would like to have in chambers. So I strongly urge you to give every consideration to Manpreet Bhandal's application. If I can provide further information, please do not hesitate to contact me, either at the phone number above or at my home number -- 655-6086.

Sincerely,

Richard L. Marcus
Horace O. Coil ('57) Chair in Litigation

Manpreet K. Bhandal

1190 Mission St, #413 • San Francisco, CA 94103 • (714) 348-1459 • mbhan5396@uchastings.edu

This writing sample is taken from an appellate brief produced for my legal research and writing course. The case was a real U.S. Supreme Court matter and involved allegations of the appellant prescribing opioids outside the usual course of professional practice. Appellant Xiulu Ruan,a licensed physician, petitioned for a writ of certiorari after the United States Court of Appeal for the Eleventh Circuit held that Dr. Ruan prescribed drugs outside the usual course of professional practice as stated in the Controlled Substances Act. The Eleventh Circuit also found that the usual course of professional practice standard was an objective standard as Respondent contended and not subjective as Dr. Ruan argued. It was also decided by the Eleventh Circuit that the good faith defense to criminal conduct as described in the Controlled Substances Act, should be narrowly construed.

For the assignment, I represented Respondent, the United States of America, in its position that Dr. Ruan prescribed drugs not within the usual course of professional practice and without a legitimate medical purpose. This writing sample has been edited for length. I am happy to provide the full copy upon request.

B. The Objective Standard is the Proper Standard to Use to Prevent Conflation of the Civil and Criminal Standard and Protect as Many Physicians and Patients as Possible.

The government must prove its case beyond a reasonable doubt in criminal cases to protect defendants and not blur the line between civil and criminal liability. *United States v. Smith*, 573 F.3d 639, 649 (8th Cir. 2009). The beyond-a-reasonable-doubt standard allows the jury to distinguish between criminal liability and civil negligence, thereby protecting innocent doctors from being convicted. *Id.* Allowance of a good faith defense also ensures that the jury will properly distinguish between the civil and the criminal standards because good faith is not available as a defense in civil liability. *Id*. Additionally, a physician's good faith defense and conduct in prescribing in the usual course of professional practice is subject to an objective standard. *Id.* at 648. Thus, the jury must focus on whether the doctor's behavior conforms to generally accepted medical standards in the United States. *Id.*

Likewise, a practitioner is not free to disregard generally accepted medical practices. *United States v. Vamos*, 797 F.2d 1146, 1151 (2d Cir. 1986); *see also United States v. Norris*, 780 F.2d 1207, 1209 (5th Cir. 1986) (holding that the objective standard test must be applied). According to the *Vamos* court, acting in good faith means acting within the confines of a defined standard of treatment. 797 F.2d at 1151. The court reasoned that the objective standard must be followed to protect the public from a group of people who have the greatest access and the greatest opportunity to divert highly addictive substances to uses not protected under the CSA. *Id*. at 1154. The court further stated that because the medical field is so regulated it does not make sense to use anything other than the objective standard. *Id*.

Only after looking at how medical professionals conduct and comport themselves is it possible to assess whether a defendant has deviated from the usual course of professional practice. *United States v. Wexler*, 522 F.3d 194, 205 (2d Cir. 2008). A good faith jury instruction

that introduces the contemplation of the defendant's intentions as to what they thought was the standard is not objective and does not serve the purposes of the CSA according to the court in *Wexler*. *Id.* at 206. The court emphasized that the words "honest" and "belief" work in service of emphasizing that honesty and belief must be directed toward professional judgment and a reasonable and honest belief in conduct that conforms with prevailing medical practices. *Id*. at 207.

For instance, the proper standard by which to gauge a good faith defense is the objective standard. *Feingold*, 454 F.3d at 1001. The court in *United States v. Feingold* found that a physician's conduct must hold up against a national standard of care. *Id*. at 1009. The court defined the national standard of care as what is generally done in the medical profession. *Id*. In that case, the physician prescribed drugs to people he had never examined, those he knew to be addicts, and he prescribed in such large quantities that it could have either killed or severely injured his patients if consumed. *Id.* at 1013. The court stated that this was certainly outside the course of professional practice and that it is appropriate when making that determination for a physician's conduct to be judged against a benchmark of accepted standards in the medical community. *Id.*

Furthermore, good faith requires the defendant to act in reasonable accordance with proper medical practice and the law. *Godofsky*, 943 F.3d at 1016. It requires the honest exercise of professional judgment to ascertain a patient's needs. *Id.* at 1026. The *Godofksy* court explained that good faith must always be objective, and it requires a physician to act in a way that follows the rules and regulations of medical practice. *Id*. Objective good faith is a defense, the court reasoned, when a physician acts within the scope of ordinary professional practice. *Id.* The court further found that a physician can be in violation of the CSA when he believes that in

an individual case, he subjectively knows better than the general medical profession. *Id*. In assessing jury instructions, the *Godofsky* court held that courts are given a great deal of discretion in crafting jury instructions to relay this information to the jury and the instructions are judged in entirety, not in isolation. *Id*. at 1019. The court also reasoned that if the jury instructions did not substantially impair a defendant's defense, the instructions will not be overturned. *Id.*

Here, the trial court properly applied the objective standard of good faith in its jury instructions. (J.A. 65.) The court refused to allow a separate supplemental instruction distinguishing the civil and criminal standard because that would further confuse the jury. (J.A. 62.) However, the jury instructions also made it clear that there was a distinction the jury had to make between the criminal and civil standard with the use of words reasonable doubt. (J.A. 67.) The court even mentioned reasonable doubt seven times prior to giving the jury instruction. (J.A. 90.) To further alleviate any confusion, the trial court defined reasonable doubt for the jury. (J.A. 91.) The defense also mentioned the difference between the criminal and civil standards during closing arguments making it certain that the jury would know the difference between the two. (J.A. 70.)

Jury instructions are not taken in isolation and lawyers have a wide range of strategies during trial of making sure that juries do not get the two confused including expert witness testimony and pre-trial motions. *Godofsky*, 943 F.3d at 1019; *see also* Ronald W. Chapman II, *Defending Hippocrates: Representing Physicians In The Wake Of The Opioid Crisis*, 43-OCT Champion 40, 41 (2019). The defense also gave an example of a surgeon leaving a sponge in a patient as an example of a civil standard, not a criminal standard. (J.A. 77.)

In giving the objective instructions, the trial court clarified that the problem with Ruan's proposed instruction was that it was subjective, and it needed to be objective. (J.A. 65.) A personal belief that patients are benefitting from certain treatments, simply is not a defense to criminal conduct under the CSA. *See Godofosky*, 943 F.3d at 1026. However, the court also added that the defendant maintains that he acted in good faith at all times in three different places on the charge sheet given to the jury. (J.A. 68.) A court is not required to adopt the jury instruction language suggested by a defendant at all. *See Godofsky*, 943 F.3d at 1011. Despite this, the Eleventh Circuit still added that Ruan maintained that he was acting in good faith at all times into the jury instruction. (J.A. 68.) Therefore, the Eleventh Circuit properly affirmed the objective good faith jury instructions.

C. The Subjective Standard Should Not Be Used for the Good Faith Defense Because It Will Leave Defendants Outside the Control of Law Enforcement and the Standard Does Not Adhere to the Requirements of the CSA.

One person's treatment methods alone do not constitute a medical practice. *Norris*, 780 F.2d at 1209. A physician's conduct is tested by "approved practice" and "accepted limits." *United States v. Moore*, 423 U.S. 122, 335 (1975). A proper jury instruction cannot turn on the distinctiveness and peculiarity of the defendant's own practice. *United States v. Hurwitz*, 459 F.3d 463, 478 (4th Cir. 2006). Ignorance of the law is not a defense to criminal prosecution and the defense should not be extended to physicians. *McFadden v. United States*, 576 U.S. 186, 187 (2015).

Allowing a defendant to inject a subjective standard into the good faith defense would allow him to decide for himself what constitutes proper medical treatment. *Hurwitz,* 459 F.3d at 479. In *Hurwitz*, the court explained that the subjective standard goes against what was decided in *Moore* which was to restrict and not expand a physician's conduct. *Id.* at 479; *see also Moore*, 423 U.S. 122 at 335. The Supreme Court in *Moore*, by mentioning that there are accepted limits

to a physician's conduct, used an objective test as should be used. *Hurwitz,* 459 F.3d at 479. To allow a physician to substitute his own views against the accepted medical standards would be to undermine drug enforcement. *Id.* at 480; *see also Rosenberg,* 515 F.2d at 195 (holding that a doctor would be free under the subjective standard to give out prescriptions on a street corner and the law would still not prohibit that conduct). The court in *Hurwtiz* held that to let a doctor define the parameters of what constitutes professional practice would be immunize the doctor against criminal liability of any sort. *Hurwitz*, 459 F.3d at 481.

Similarly, the guise of innovative medical practices cannot be used to escape criminal prosecution. *Moore*, 423 U.S. at 144. In *Moore*, this Court noted that while Congress was aware when drafting the CSA that physicians require legitimate experimentation, there must be limits because of the high likelihood of abuse. *Id*. The defendant in *Moore* did not offer physical examinations, ignored the results of urinalysis tests, took no precautions as to the misuse of the drugs, and prescribed large quantities of drugs with no instructions as to their use. *Id.* at 128. This Court held that approved practice methods are pivotal for a physician raising a defense of his actions and those approved practices must be in line with the medical profession. *Id.* at 145. The intent of Congress was to have physicians practice medicine within approved limits, not to cease following those limits in the name of experimentation. *Id.* at 142.

Further, Section 841(a) makes it unlawful for anyone to knowingly or intentionally commit the offense of distributing a controlled substance. *United States v. Collazo*, 84 F.3d 1308, 1323 (9th Cir. 2021). In determining whether Congress intended mens rea to apply to noncontiguous words and phrases, a natural reading of the statutory language is preferred. *Id.*

Applicant Details

First Name	**Rupan**
Last Name	**Bharanidaran**
Citizenship Status	**U. S. Citizen**
Email Address	**rbharanidaran@uchicago.edu**
Address	**Address** Street **5118 South Dorchester Avenue, 403** City **Chicago** State/Territory **Illinois** Zip **60615-4159** Country **United States**
Contact Phone Number	**714-718-4188**

Applicant Education

BA/BS From	**University of California-Los Angeles**
Date of BA/BS	**June 2018**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The Chicago Journal of International Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Edward W. Hinton Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hallett, Nicole
nhallett@uchicago.edu
773-702-9611
Huq, Aziz
huq@uchicago.edu
773-702-9566

This applicant has certified that all data entered in this profile and any application documents are true and correct.

5118 S. Dorchester Ave., Apt #403
Chicago, IL 60615
(714) 718-4188

June 12, 2023

The Honorable Juan R. Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106

Dear Chief Judge Sanchez:

I am a rising third-year student at the University of Chicago Law School applying for a clerkship position for the 2024-2025 term. My long-term goal is to work as a trial attorney at the federal government level, and I believe a district court clerkship would be an invaluable experience in aid of that goal. I am particularly interested in working in your chambers because of your extensive background in public service and my desire to eventually live and work in the Northeast. My clerkship aspirations are also the result of my internship and clinical experiences during law school.

During my 1L summer last year, I had the opportunity to work at both the U.S. Attorney's Office in San Jose, CA and the U.S. Department of Justice's Tax Division in Washington, DC. These two internships taught me that I enjoy litigation involving the federal government because such cases tend to be challenging and have a widespread impact. For example, at the U.S. Attorney's Office, I worked on a Federal Tort Claims Act case involving serious and well-publicized claims of abuse committed by a federal agency employee. Helping draft the motion to dismiss in that case taught me how to craft compelling legal arguments that could overcome highly unfavorable fact patterns. And at the Tax Division, I learned how influential federal government litigation can be when I assisted with procedural research and appellate brief drafting for cases whose outcomes would impact millions of taxpayers across the country.

I built on the skills I gained during my summer internships by working for the Immigrants' Rights Clinic during my 2L year. I assisted with settlement negotiations involving an immigrant detained for national security reasons and helped prepare a detailed claims memo to support a Section 1983 case involving an individual who was wrongfully imprisoned by local sheriff's deputies. Working on these matters taught me how to use shrewd litigation strategy and thorough legal research to support clients even when it seems as if the system is stacked against them.

A resume, transcript, and writing sample are enclosed, and letters of recommendation from Professors Hallett and Huq will arrive under separate cover. Thank you for the opportunity.

Sincerely,

Rupan Bharanidaran

Enclosures

Rupan Bharanidaran
5118 South Dorchester Avenue, Apt. #403, Chicago, IL 60615
714-718-4188 | rbharanidaran@uchicago.edu

EDUCATION

The University of Chicago Law School **Chicago, IL**
J.D. expected June 2024
Journal: *The Chicago Journal of International Law*, Executive Articles Editor (2023-2024), Staff Member (2022-2023)
Activities: South Asian Law Students Association (Co-President), Hinton Moot Court (Participant)
Awards: 2022-2023 Donald E. Egan Scholar

University of California, Los Angeles **Los Angeles, CA**
B.A., *cum laude,* in Political Science and Economics; Minor in Accounting, June 2018
Honors: Phi Beta Kappa, Departmental Highest Honors (Political Science), Dean's List
Thesis: "Wasted Donations in U.S. House Primaries" (Honors)

EXPERIENCE

Sullivan & Cromwell, LLP **New York, NY**
Summer Associate *June 2023 – August 2023*

Immigrants' Rights Clinic **Chicago, IL**
Student Attorney *October 2022 – May 2023*
- Conducted legal research and participated in litigation strategy for an immigration case implicating national security issues
- Drafted a complaint and prepared claims memo for a Section 1983 case on behalf of an unlawfully detained immigrant
- Advised clients on a variety of immigration issues and assisted them with preparing forms during call-in clinic sessions

U.S. Department of Justice, Tax Division, Appellate Section **Washington, DC**
Summer Intern *August 2022 – September 2022*
- Prepared research memoranda on a variety of procedural and tax litigation issues, including nationwide vacaturs, the appealability of adverse collateral rulings, and the legislative history of the Treasury Offset Program
- Drafted sections of briefs to be filed with federal appeals courts on various cases involving delinquent taxpayers
- Helped prepare attorneys for oral arguments, including participating in moot courts and debriefing after hearings; conducted research that helped an attorney timely respond to a question posed by a judge during oral argument

United States Attorney's Office, Northern District of California **San Jose, CA**
Summer Law Clerk *June 2022 – July 2022*
- Drafted a brief for motion to dismiss in a case involving sovereign immunity and the Federal Tort Claims Act
- Conducted document review during discovery and prepared memorandum distilling the most relevant facts and information
- Supported an Assistant United States Attorney with deposition preparation, including preparing a question outline

The University of Chicago Graduate Council **Chicago, IL**
Vice President of Community and Social Wellness Fund *February 2022 – May 2023*
- Managed the graduate student government's $70,000 fund for social events and group activities
- Streamlined the funding allocation process by working closely with graduate student groups applying to the fund
- Received the 2022 and 2023 Distinguished Service to the University of Chicago Community Awards for my leadership

PricewaterhouseCoopers, LLP **Irvine, CA**
Senior Tax Associate, Tax Associate *July 2018 – July 2021*
- Prepared tax calculations, returns, forms, and memoranda for year-round federal and state tax compliance
- Handled correspondence with the Internal Revenue Service and state tax authorities on tax controversy issues
- Supervised teams of associates and the firm's offshore India team to ensure smooth project completion

UCLA Daily Bruin **Los Angeles, CA**
News Editor *June 2017 – June 2018*
- Led the student newspaper's 40-person award-winning News section, which produced six stories a day, five days a week
- Oversaw the production process, including pitching content, managing reporters, editing drafts, and organizing article layouts

LICENSE AND LANGUAGE SKILLS

- Licensed Certified Public Accountant; Languages: Mandarin Chinese (basic); Tamil (native)

THE UNIVERSITY OF CHICAGO

Name: Rupan K Bharanidaran
Student ID: 12280673

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

University of California, Los Angeles
Los Angeles, California
Bachelor of Arts 2018

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law William Baude	3	3	178
LAWS	30211	Civil Procedure Diane Wood	4	4	178
LAWS	30611	Torts Saul Levmore	4	4	178
LAWS	30711	Legal Research and Writing Aneil Kovvali	1	1	180

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Jonathan Masur	4	4	177
LAWS	30411	Property Aziz Huq	4	4	179
LAWS	30511	Contracts Douglas Baird	4	4	179
LAWS	30711	Legal Research and Writing Aneil Kovvali	1	1	180

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Aneil Kovvali	2	2	178
LAWS	30713	Transactional Lawyering David A Weisbach	3	3	177
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	179
LAWS	43201	Comparative Legal Institutions Thomas Ginsburg	3	3	177
LAWS	44201	Legislation and Statutory Interpretation Farah Peterson	3	3	179

Summer 2022

Honors/Awards
The Chicago Journal of International Law, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	44121	Introductory Income Taxation Julie Roin	3	3	180
LAWS	45801	Copyright Randal Picker	3	3	181
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	2	0	
LAWS	94130	The Chicago Journal of International Law Anthony Casey	1	1	P
LAWS	97124	Blockchain, Cryptocurrencies, and Web3 Anthony Zhang Anup Malani	3	3	180

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	42401	Securities Regulation Adriana Robertson	3	3	182
LAWS	46101	Administrative Law David A Strauss	3	3	179
LAWS	59903	Judicial Federalism Diane Wood	3	0	
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	2	0	
LAWS	94130	The Chicago Journal of International Law Anthony Casey	1	1	P

Date Issued: 05/31/2023

THE UNIVERSITY OF CHICAGO

Name: Rupan K Bharanidaran
Student ID: 12280673

University of Chicago Law School

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence John Rappaport	3	3	179
LAWS	42801	Antitrust Law Eric Posner	3	3	180
LAWS	53193	Topics in State and Local Finance Julie Roin	2	2	181
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	2	0	
LAWS	94130	The Chicago Journal of International Law	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement Anthony Casey			

Honors/Awards

The Donald E. Egan Scholar Award, to a student who has demonstrated a strong interest in the Law School and has a reputation for integrity

End of University of Chicago Law School

Date Issued: 05/31/2023

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

- I — **Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
- IP — **Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
- NGR — **No Grade Reported:** No final grade submitted
- P — **Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
- Q — **Query:** No final grade submitted (College only)
- R — **Registered:** Registered to audit the course
- S — **Satisfactory**
- U — **Unsatisfactory**
- UW — **Unofficial Withdrawal**
- W — **Withdrawal:** Does not affect GPA calculation
- WP — **Withdrawal Passing:** Does not affect GPA calculation
- WF — **Withdrawal Failing:** Does not affect GPA calculation
- **Blank:** If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

- H — Honors Quality
- P* — High Pass
- P — Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website: http://registrar.uchicago.edu.

Revised 09/2016

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL

1111 East 60th Street | Chicago, Illinois 60637
PHONE 773-702.9611 | FAX 773-702-2063
E-MAIL nhallett@uchicago.edu
www.law.uchicago.edu

Nicole Hallett
Clinical Professor of Law

May 30, 2023

The Honorable Juan R. Sanchez
United States District Court
Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Rupan Bharanidaran Clerkship Application

Dear Chief Judge Sanchez:

I write in support of Rupan Bharanidaran's application for a clerkship in your chambers. I am a Clinical Professor of Law and the Director of the Immigrants' Rights Clinic (IRC) at the University of Chicago Law School. IRC is a small, experiential course that enrolls 8-10 students per year. I meet with each student individually multiple times each quarter and meet with small student teams each week in addition to the weekly seminar. I also review and provide feedback on many drafts of work product throughout the year and observe and supervise fieldwork events such as client meetings and court appearances. Therefore, I get to know my clinic students very well and have the opportunity to observe them in many different contexts. Rupan joined IRC in September 2022 and I have worked with him for three consecutive quarters. Based on this experience, I can confidently say that Rupan would make a fantastic law clerk.

Normally, students are assigned to two matters, but Rupan has worked on many matters in the clinic this year. The reason is simple: every time another team needed help, he has offered to jump in and assist. The matters he was assigned to at the beginning of the year could not have been more different. In the first matter, we are representing an Iraqi refugee accused of being an ISIS leader in a habeas petition seeking his release. The case is extraordinarily complex, with multiple levels of litigation occurring simultaneously. It is also difficult because the client has been detained for four years even though he has never been charged with a crime, which has put enormous stress on him and his family. This year, we have been engaged in settlement negotiations with the government while a Ninth Circuit appeal remains pending. Rupan joined the team in the middle of the case, which in and of itself is difficult for a law student. Yet, he was able to quickly grasp and understand the legal issues and status of negotiations. Whenever we have needed help with research, he was the first one on the team to volunteer. He also helped with some difficult client counseling that not many law students would be able to handle.

Rupan also represented an undocumented immigrant who was the victim of a serious crime on her U visa application. This matter required Rupan and his teammates to compile an application packet including a letter brief, declaration, and support evidence. I was impressed with Rupan's writing ability on the letter brief, as well as his perseverance in getting the client's signature after a last-minute emergency took her out of town.

In addition to these assigned materials, Rupan took on two additional projects over the course of a year. In one matter, Rupan researched a thorny administrative law issue regarding redressability and multi-agency interaction under the Administrative Procedure Act. It was not a simple research question, and it could not be answered with a simple Westlaw search. It took Rupan a few weeks, but he managed to figure it out and write an informatively, clear, and compelling legal memo. In another case, Rupan joined a team that needed to respond to an emergency motion. Not only was he the first to volunteer, but he then put in many late nights making sure the response was ready to file. He caught several errors the team had made in their legal research. I'm not sure how we would have been able to write the brief without his help.

I have observed many skills that Rupan has that will make him well-suited to clerking. He has exceptionally strong research and writing skills, works well in a collaboratively environment, is a self-started and hard worker, and takes instructions and feedback well. I have seen him develop over the course of the year to be even stronger in these areas. He also is capable of managing multiple projects simultaneously and appears to have good time management. I never worried that Rupan would not complete his work excellently and on time. For these reasons, I strongly recommend him for a clerkship in your chambers. If you need additional information about Rupan to make your decision, please feel from the contact me at nhallett@uchicago.edu or 203-910-1980. I would be pleased to have the opportunity to answer any questions you may have.

Sincerely,

Nicole Hallett
Clinical Professor of Law
University of Chicago Law School

NH/z

Professor Aziz Huq
Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
huq@uchicago.edu | 773-702-9566

May 25, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Rupan Bharanidaran (University of Chicago Class of 2024), to the position of law clerk in your chambers. I know Rupan through having taught him in two classes—Property and Constitutional Law: Equal Protection and Due Process. Rupan performed well in both of those classes and has assembled a strong set of grades across the one-and-a-half years he has been at the law school. These have deservedly gained for him a place on one of the law reviews, where he has taken on a substantive leadership role. Based on my experiences teaching him, and my conversations with him around the law school, I think that Rupan has both the intellectual ability and the temperament to be a really good law clerk, who will make any chambers a better one. I hence recommend him highly for that position.

I have taught Rupan in two classes and will address those and his academic record more generally to begin with. Those two classes were Property (which is a 1L class) and Constitutional Law: Equal Protection and Due Process (which is a 1L elective class). They are very different classes. The first is a large common-law class with a hefty dose of economics and of political theory (e.g., Locke and Nozick). The second involves a great deal of history and focuses on the way in which different moments in history have shaped the selection of controversies and the nature of the rules that emerge. The two classes, that is, are very different: They require somewhat different skill sets to excel. Yet in both classes, Rupan obtained a very high “B.” In an era of grade inflation generally, this performance will not sound like much—but I want to stress without reservation that these are impressive grades. They place him within the top 15% of so each class. And they demonstrate more than enough legal skill to not just manage but to thrive in a federal clerkship.

More generally, Rupan has offered as good or better a performance in all his courses, and further his grades evince a noticeable uptick in his second year. In his first quarter of 2L year (fall 2022), for example, Rupan obtained very high grades (all As) in tough classes such as Copyright and Income Taxation. These suggest that after his first year, Rupan has now found his feet—and is turning out to be an excellent law student. I have no reason to believe that this upward trajectory won’t continue, and that Rupan will in the end secure a place at the top end of his class. The fact that he was selected for the Chicago Journal of International Law—where he has taken on the leadership role of being an articles editor—does not surprise me at all. Rather, it is consistent with his performance in class.

His grades, moreover, should be understood in the general context of Chicago assessment modalities. Unlike many other law schools, Chicago abjures grade inflation in favor of a very strict curve round a median score of 177 (which is a B in our argot). There is not large movement from the median. Because Chicago grades on a normal distribution, and because it is on the quarter system, it is possible to be very precise about where a student falls in a class as a whole. This is simply not possible with a grading system of the kind used by some of our peer schools, which are seemingly designed to render ambiguous and inscrutable differences between the second tier of students and the third- and fourth-tiers. In Chicago’s reticulated grading system, Rupan’s scores should be seen as very good ones.

Moreover, Rupan would bring a varied professional and scholarly background to a clerkship. Before law school, for example, he worked for PricewaterhouseCoopers on tax issues for large, multinational corporations. He has built on that experience by spending time at the U.S. Department of Justice’s tax division. Here, he worked mostly on appellate matters—hence addressing complex and cutting-edge issues of federal tax law. He has also spent time last summer at the Northern District of California’s U.S. Attorney’s office. These experiences not only demonstrate his concerted efforts to develop deep expertise in an important area of the law, but they also showcase his commitment to public service. Rupan tells me that he plans to spend a little time at big law upon graduation—likely Sullivan & Cromwell—before transitioning into government for the balance of his career. That seems very credible to me. Finally, it is worth adding here that while at UCLA for his undergraduate training, Rupan spent a lot of time working for the Daily Bruin—honing his research and writing skills in another way.

Rupan has been a lively and active member of the law school community. He has not only led a South Asian law students association, but he has also participated with distinction in the moot court. I have had a number of conversations with Rupan over the last year outside of class (it’s a small law school and such conversations are common)—and I have always been impressed by his quiet assurance and sense of humor. My sense is thus that he would be a very positive presence in chambers because of his strong yet not domineering interpersonal skills.

Based on all this evidence, I have every expectation that Rupan will be a very good clerk. I am an enthusiastic supporter of his

application, and very much hope you consider it seriously. I would be happy to answer any questions you have about his candidacy and can be reached at your disposal at huq@uchicago.edu and 703 702 9566.

Kind regards,

Aziz Huq

Rupan Bharanidaran
5118 South Dorchester Avenue, Apt. #403, Chicago, IL 60615
714-718-4188, rbharanidaran@uchicago.edu

Explanation of Writing Sample

I drafted the following motion to dismiss as part of my internship at the U.S. Attorney's Office in San Jose, CA during the Summer of 2022. Several patients who were allegedly abused by a psychiatrist at the Veterans Affairs hospital in San Jose sued the U.S. Department of Veterans Affairs under the Federal Tort Claims Act ("FTCA"). They alleged that the psychiatrist pursued a sexual and romantic relationship with one of the plaintiffs and acted inappropriately towards the other plaintiffs.

I am providing an excerpt from the motion's Argument section where I argue that the plaintiffs' claims fall outside the California scope of employment standards and are barred by the FTCA's Intentional Torts exception. Therefore, the court should dismiss plaintiffs' complaint for lack of subject-matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The motion was ultimately never filed in court because the parties came to a settlement.

Parties' names have been changed and the case number has been removed for confidentiality reasons. Otherwise, the following motion is as I prepared it during my internship, with minimal edits and guidance from my supervisor. I have received permission from my employer to use this redacted version of the motion as a writing sample.

IV. ARGUMENT

A. Defendant Jane Acted Outside the Scope of Her Employment

1. California's Scope of Employment Standards

Plaintiffs allege vicarious liability for Dr. Jane's torts: intentionally inflicted emotional distress (Count 2), battery (Count 3), breach of fiduciary duty (Count 4), sexual harassment (Count 5), negligence per se (Count 6), sexual battery (Count 7), and sexual abuse by a therapist (Count 8). The FTCA applies only to torts that a federal employee commits "while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). Therefore, Plaintiffs seek to hold the United States liable for Dr. Jane's actions under the theory of respondeat superior, wherein an employer is "vicariously liable for the torts of its employees committed within the scope of the employment." *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 907 P.2D 358, 360 (Cal. 1995); *see also* Cal Gov't Code § 815.2.

In considering whether an employee acted within the scope of his or her employment, a court "appl[ies] the respondeat superior principles of the state in which the alleged tort occurred." *Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993). California courts have held that respondeat superior serves primarily to ensure that "losses caused by the torts of employees, which as a practical matter *are sure to occur* in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business." *Bailey v. Filco, Inc.*, 56 Cal. Rptr. 2d 333, 335 (1996) (emphasis added). The courts have made clear that "respondeat superior liability is not synonymous with strict liability. The employer is not liable for every act of the employee committed during working hours." *Id.* at 336 (*citing Alma W. v. Oakland Unified Sch. Dist.*, 176 Cal. Rptr. 287, 289 (1981).

Respondeat superior will not apply unless plaintiffs can establish the existence of a "causal nexus or reasonable relationship between the duties of employment and the conduct causing injury." *Baptist v. Robinson*, 49 Cal. Rptr. 3d 153, 160 (2006). That is, an employer will only be liable if in committing the tortious act, the employee had been "engaged in the duties which he was employed to perform or those acts which incidentally or indirectly contribute to the employer's service." *Tryer v. Ojai Valley Sch.*, 12 Cal. Rptr. 2d 114, 115 (1992) (internal citations and quotation marks omitted). It is therefore "necessary to determine the main purpose of the injury-producing activity: if it was the pursuit of the

employee's personal ends, the employer is not liable." *Le Elder v. Rice*, 26 Cal. Rptr. 2d 749, 751 (1994).

In *Rodgers v. Kemper Const. Co.*, 124 Cal. Rptr. 143, 148-149 (1975), the Court of Appeal proposed a "foreseeability test" for respondeat superior, defining foreseeable conduct as that which, "in the context of the particular enterprise . . . is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." Ensuing case law has developed the foreseeability analysis into a two-pronged test in which the court asks whether an employee's action is "(1) either required or incident to his duties or (2) . . . could be reasonably foreseen by the employer in any event." *Clark Equip. Co. v. Wheat*, 154 Cal. Rptr. 874, 882 (1979) (internal citations and quotations omitted). If plaintiffs cannot satisfy either prong, their claims based on respondeat superior must fail. *See Bailey*, 56 Cal. Rptr. 2d at 337-341.

It is not enough to show that the employment situation made it possible for the employee to commit their torts. In *Rydberg v. United States Postal Service*, for example, the Ninth Circuit held that a federal employee's sexual harassment "departed from his duties significantly," rendering it outside the scope of employment, "despite the fact that his actions occurred during working hours while he used the facilities and authority of [his employer]." *Rydberg v. United States Postal Serv.*, No. 20-CV-03230-SK, 2021 WL 1851033, at *4 (N.D. Cal. Jan. 21, 2021).

Although sexual assaults are not per se beyond the scope of employment, California courts (and federal courts applying California law) generally do not find a therapist's sexual misconduct with a patient to be within the scope of employment.[1] *See e.g., Tate v. United States*, No. CV 18-3079 PA (PLAx), 2018 WL 6444885, at *3 (C.D. Cal. October 30, 2018) (VA psychologist acted outside of scope of employment when entering into a romantic relationship with a patient); *Lowery v. Reinhardt*, No. S-07-0880 RRB DAD, 2008 WL 550083, at *5–*7 (E.D. Cal. Feb. 27, 2008) (finding a doctor was acting outside the scope of his employment when he started a sexual relationship with a patient who he was

[1] While the Ninth Circuit in *Simmons v. United States* did find that a mental health counselor acted within the scope of his employment when he wrongfully engaged his patient in a sexual relationship, *Simmons* is distinguishable because the court applied Washington law. 805 F.2d 1363, 1370 (9th Cir. 1986).

treating for depression and anxiety); *Johnson v. Cnty. of Fresno*, No. F047316, 2006 WL 1917804, at *6 (Cal. Ct. App. July 13, 2006) (holding a therapist's sexual advances toward his patient were outside the scope of employment because they were not a "normal and foreseeable" part of the therapist-patient relationship).

2. Dr. Jane's Misconduct Was Neither Required nor Incidental to Her Duties as a VA Employee

"[For a court] to hold an employer vicariously liable[,] the employee must [have been] engaged in the duties which he was employed to perform or those acts which incidentally or indirectly contribute to the employer's service." *Tryer*, 12 Cal. Rptr. 2d at 115 (internal quotations and citations omitted). Conversely, an employer will not be held liable if the employee were "prompted by wholly personal motivations" in pursuing the activities that led to the tortious conduct. *Alma W.*, 176 Cal. Rptr. at 290. This is the heart of California's respondeat superior law and is embodied in the first prong of the two-step inquiry utilized in *Clark*, *Bailey*, *Alma W.*, *et al*. The employee's tort must be "foreseeable *in light of the employee's duties*" for liability to attach to the employer, *Bailey*, 56 Cal. Rptr. 2d at 336 (emphasis in original), but "if an employee's tort is personal in nature, mere presence at the place of employment and attendance to occupational duties prior or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior." *Baptist v. Robinson*, 49 Cal. Rptr. 3d at 160. *See also Giovinco v. Soc. Sec. Admin.*, No. CV-15-07067-MWF-FFM, 2017 WL 11631208, at *7 (C.D. Cal. Feb. 27, 2017) ("California courts consistently conclude, as a matter of law, that sexual misconduct in the workplace is "personal" and not a risk able to be allocated to the employer").

In *Lisa M. v. Henry Mayo Newhall Memorial Hospital*, an ultrasound technician sexually assaulted a patient ten minutes after conducting the patient's ultrasound examination. 48 Cal. Rptr. 2d 510 (1995). The California Supreme Court held that the hospital was not vicariously liable for the technician's assault because the technician was not acting within the scope of his employment when he assaulted the patient. *Id.* The court found that the technician's decision to assault the patient was personal and did not grow out of his workplace responsibilities. *Id.* at 364.

As in *Lisa M.*, Dr. Jane's decision to enter into a personal relationship with Adam, and the actions she took to further that relationship, did not grow out of her workplace responsibilities. Dr. Jane was hired to perform examinations of psychiatric patients and provide diagnostic and therapeutic therapy, not pursue romance. Ex. GG at USA00000182. Her sexual misconduct occurred after work hours and away from the VA. Adam Dep. at 132:22-24. She did not document her relationship with Adam in her medical records and told Smith and George to not report the relationship to the VA. Smith Dep. at 15:6-15. In fact, Dr. Jane knew that having sex with a patient was a violation of California law, telling Adam her decision to pursue their relationship despite its illegality was a testament to her love for him, and "she was willing to risk everything" to be with him. Adam Dep. at 144:19-23. To better conceal their illegal personal relationship, Dr. Jane coached Adam to lie to others by not mentioning her name or place of employment. *Id.* at 86:16-25.

Despite knowing that Adam was an alcoholic, Dr. Jane completely departed from her professional responsibility of addressing his alcohol issues in favor of her own personal desires. She constantly bought Adam alcohol and once gave him an unlawful, unauthorized hallucinogen outside therapy without his knowledge or consent. *Id*. at 69:20-21; 37:24-25; 38:1-8. *See Lowery*, No. CIV. S-07-0880RRBDA, 2008 WL 550083, at *6 (E.D. Cal. Feb. 27, 2008) (dismissing for lack of subject matter jurisdiction where a doctor secretly having sex with his patient at hotels away from his office and giving his patient alcohol and certain prescription medicine was "solely for personal gratification," not incidental to his duties as a physician). Throughout their sexual and romantic relationship, Adam was drunk "almost every day" at Jane's residence. Adam Dep. at 155:5-20; 156:14-16. There, during this period when Adam was drinking heavily, Dr. Jane was able to pursue her wholly personal desires and initiated sex with Adam a "minimum of one to three times a day." *Id.* at 133:15-24. No part of luring an alcoholic man to her residence, encouraging him to drink alcohol there, and fulfilling her own sexual gratification once he was drunk is incidental to Dr. Jane's duties as a psychiatrist.

Dr. Jane telling Smith and George about her relationship with Adam also did not grow out of her workplace responsibilities because this act arose only out of her decision to continue her personal relationship with Adam. Against Adam's wishes, Dr. Jane pursued her own agenda to legitimize their relationship by informing Smith and George, "Adam and I are dating now." Adam Dep. at 151:10-25.

Dr. Jane's conduct, which she kept hidden from the VA before her confession, was clearly beyond the scope of her duties as a VA psychiatrist. *See Tate*, 2018 WL 644887 (C.D.CA October 30, 2018) at *1, *5 (holding a VA psychologist's sexual relationship with a patient was not an outgrowth of her workplace responsibilities despite their sexual encounters occurring in the psychologist's office during the patient's regularly scheduled therapy sessions).

3. Dr. Jane's Misconduct Was Not Foreseeable in Any Event

The second prong of California's two-step test asks if the employee's injury-producing activities were foreseeable in any event—that is, whether the risk created by the employee's actions "was one that may be fairly regarded as typical of or broadly incidental to the enterprise undertaken by the employer." *Alma W.*, 176 Cal. Rptr. at 291. In *Alma W.*, the court held "the test is not whether it is foreseeable that one or more employees might at some time act in such a way as to give rise to civil liability, but rather, whether the employee's act is foreseeable *in light of the duties* the employee is hired to perform." *Id. (citing* Rest. 2d Agency § 245 (1957)) (emphasis in original). Accordingly, the court found that a school district could not be held liable for an act of sexual assault committed by a janitor since "[t]here is no aspect of a janitor's duties that would make sexual assault anything other than highly unusual and very startling." *Id.* at 292. *See Johnson*, No. F047316, 2006 WL 1917804, at *5 (Cal. Ct. App. July 13, 2006) (holding "sexual misconduct between a therapist and a client is 'startling'" and not foreseeable in light of the therapist's job of assessing and stabilizing the patient during a mental health crisis). *See also* Adam Dep. at 137:11-12 ("[D]o you think her [Dr. Jane's] conduct was unusual or startling?" "Yes. I suppose so, yes.")

Lisa M. holds that the tortfeasor's employment must "be such as predictably to create the risk employees will commit intentional torts of the type for which liability is sought." *Lisa M*, 12 Cal. 4th 291 at 299. A "deliberate, independently motivated sexual battery" did not arise from risks predictably created by the ultrasound technician's employment. *Id.* at 304. Similarly, in the instant case, Dr. Jane's repeated, concealed acts of assault and exploitation to further her personal relationship with Adam cannot be said to have been within the scope of the VA's stated mission of providing medical care to veterans. *See John Y. v. Chaparral Treatment Ctr., Inc.*, 101 Cal. App. 4th 565, 577, 124 Cal. Rptr. 2d 330, 339 (2002) (holding a mental health clinician unforeseeably mishandled the close therapist-patient

relationship when he sexually assaulted a patient, contrary to his job's purpose of ensuring patient care and wellbeing).

Dr. Jane pressured Adam to have sex with her, initiating sex one to three times per day, over a period of five months. Adam Dep. at 132:15-21; 133:12-18. She even pressured him into performing sex acts that made him uncomfortable, which Adam agrees were part of their personal relationship. *Id.* at 135:2-18. This highly startling and unusual act amounts to "abuse of [her] authority to indulge in personal sexual wrongdoing [that] is too attenuated to permit a trier of fact to view [her] sexual assaults as within the risks allocable to [her] employer." *Id.* at *576. In fact, the VA's own internal training on staff and patient boundaries makes clear that employees are prohibited from pursuing sexual relationships with patients and may be suspended or subject to disciplinary action for doing so. Ex. MM.

Dr. Jane also engaged in emotionally manipulative behavior to solidify her relationship with Adam that likewise falls outside the scope of employment. For example, she repeatedly told Adam, through text and verbally, that she loved him, and that Adam was "living in darkness before [he] met her." Ex. O; Adam Dep. at 124:12-25; 129:1-4. She pushed him to cut ties with his friends and family by telling Adam that he actually "hated [his] family and friends" and that they were "horrible people" who would "ruin [his] life." *Id.* at 129:10-14; 145:4-25; 146:1-4, 15-23. Dr. Jane's emotional manipulation was successful, with Adam at one point starting to believe that his feelings were whatever she told him they were. *Id.* At 6-7. Dr. Jane tried to isolate Adam from his friends and family to keep him all to herself.

Dr. Jane also bought Adam a wedding ring and had one point even tried to get married with him at a courthouse, despite Adam's misgivings about marriage. *Id.* at 104:14-15; 164:23-25; 165:1-6; 166:16-17. Dr. Jane also frequently told Adam about her desire to have a daughter with him, and even told Adam that she was possibly pregnant with his baby. Ex. N at KP000850; Adam Dep. at 167:13-15, 21-24. On one occasion, Dr. Jane forced Adam to travel to Wisconsin with her against his will. *Id.* at 135:24-25. She also tried to get Adam to use his VA benefits to obtain a loan to help her purchase land that she could build a home on, even going so far as to book appointments to go house shopping with

him. *Id.* At 168:1-4, 9-12. These are all actions that Dr. Jane engaged in to satisfy her wholly personal desires and had nothing to do with her employment duties.

Dr. Jane also made inappropriate comments to Smith and George, including repeatedly encouraging the two to pursue a romantic relationship with each other. Smith Dep. at 64:8-11; George Dep. at 71:8-22. These statements are plainly outside Dr. Jane's scope of employment—she was hired to be a psychiatrist, not a matchmaker. Dr. Jane also asked Smith intrusive questions about her dating and sex life, including her masturbation habits, and told George that she knew he was subconsciously physically and emotionally attracted to Dr. Jane. Smith Dep. at 84:14-22; George Dep. at 71:8-22; 59:7-14; 60:25; 61:1-10; 65:8-16. These are comments that are likewise so attenuated from Dr. Jane's job duties that they are unforeseeable. Dr. Jane did these things for her own personal gratification.

Dr. Jane's misconduct was also not foreseeable because of her concerted efforts to conceal her actions, such as by asking Plaintiffs to not reveal her relationship with Adam. Adam Dep. at 136:15-25; 137:1-16; 141:13-21; Smith Dep. at 15:6-15. In fact, Dr. Jane's concealment efforts were so successful that when Adam told his psychologist that he was dating a psychiatrist, he lied to her when the psychologist asked him if he was dating someone who was treating him. Adam Dep. at 139:18-25; 140:1-21. Dr. Jane's concealment efforts, and the fact that none of the Plaintiffs came forward to the VA prior to Dr. Jane's confession, meant that the VA did not ratify Dr. Jane's misconduct because it did not—and could not—know about her actions.

Lastly, Plaintiffs complain that Dr. Jane discussed astrology during treatment sessions; however, the Plaintiffs' medical records contain no reference to astrology. *Id*. at 183:4-24; Smith Dep. at 79:6-18; George Dep. at 130:23-25; 131:1-6. Plaintiffs, in their deposition testimony, were also unable to confirm that Dr. Jane actually used astrology when making treatment decisions. Adam Dep. at 183:4-9; Smith Dep. at 79:19-21; George Dep. at 131:2-6. This suggests that Dr. Jane was concealing her discussions of astrology from her employer, which is persuasive evidence that she understood that astrology was not a part of her official duties, and therefore falls outside the scope of her employment.

Plaintiffs bear the burden to prove that the employee committed the wrongful act within the scope of employment, and if Plaintiffs cannot sustain this burden, the Court must dismiss their claims against the United States for lack of subject-matter jurisdiction. *Ducey v. Argo Sales Co.*, 602 P.2d 755,

763 (Cal. 1979); *Clamor*, 240 F.3d at 1217. Even when viewed in a light most favorable to the Plaintiffs, the facts of this case demonstrate that Dr. Jane, as a matter of law, did not act within the course and scope of her employment with the VA when she committed her actions. Accordingly, the Court should dismiss all claims against the United States that are based on principles of respondeat superior.

B. Plaintiffs' Intentional Tort Claims Are Barred by the FTCA's Intentional Tort Exception

Plaintiffs allege vicarious liability based on a respondeat superior theory for various intentional torts committed by Dr. Jane, including intentionally inflicted emotional distress (Count 2), battery (Count 3), breach of fiduciary duty (Count 4), sexual harassment (Count 5), sexual battery (Count 7), and sexual abuse by a therapist (Count 8). Even if Dr. Jane had acted within the scope of her employment, those claims are barred by sovereign immunity because they fall within the FTCA's intentional tort exception.[2]

28 U.S.C. § 2680(h) excludes from the purview of the FTCA "any claim arising out of assault [or] battery." 28 U.S.C. § 2680(h). If the conduct alleged to be tortious falls within the scope of Section 2680(h), sovereign immunity is not waived, and the Court lacks subject matter jurisdiction over the action except under certain circumstances not relevant here. *See Sheridan v. United States*, 487 U.S. 392, 395 (1988) ("[T]he general rule [is] that the Government is not liable for the intentional torts of its employees"). Accordingly, claims barred by the intentional tort exception must be dismissed. *See Dalehite v. United States*, 346 U.S. 15, 24 (1953); *LeCrone v. U.S. Navy*, 958 F. Supp. 469, 473 (S.D. Cal. 1997) (barring assault and battery claims); *Moore v. United Kingdom,* 384 F.3d 1079, 1088 (9th Cir. 2004) (barring claims "arising out of assault"); *United States v. Shearer*, 473 U.S. 52, 55 (1985) (barring both "claims for assault or battery" and "any claim arising out of assault or battery"). Therefore, Plaintiffs' claims for sexual battery (Count 3) are explicitly barred by the intentional tort exception and must be dismissed.

[2] Unlike the issue of scope of employment, which is governed by California law, the intentional tort exception is governed by federal law. *See Woods v. United States*, 720 F.2d 1451, 1453 n.2 (9th Cir. 1983) (noting that the tort's classification in Section 2680(h) of the FTCA, not state law, is what the court uses to evaluate the tort).

Moreover, sexual harassment and sexual assault claims are also barred by the intentional tort exception because they either are direct assault or battery claims or arise from assault or battery claims. *Tripodi v. Fero*, No. CV 20-08322 PCT CDB, 2021 WL 3661140, at *5 (D. Ariz. Aug. 6, 2021). *See Xue Lu v. Powell*, 621 F.3d 944, 950 (9th Cir. 2010) ("The alleged touchings of the women were batteries and the sexual character of these offenses may not change their gravamen"). *See also Fisher v. Army Nat'l Guard*, No. 120CV01471NONEEPG, 2021 WL 5989798, at *15 (E.D. Cal. Dec. 17, 2021) (holding a claim of sexual assault that included respondeat superior allegations was "subject to dismissal due to the FTCA's intentional tort exception"), *report and recommendation adopted*, No. 120CV01471JLTEPG, 2022 WL 329559 (E.D. Cal. Feb. 3, 2022). Thus, Plaintiffs' claims for sexual harassment (Count 5), sexual battery (Count 7), and sexual abuse by a therapist (Count 8), which all arise from the above battery claim, are barred and must be dismissed.

Dr. Jane's assault and battery of Adam includes touching Adam "in a sexual way," having him "strip down" and then proceeding to "rub up on him," grabbing his buttocks, and stroking him. Adam Dep. at 115:19-21; 131:24-25; 132:1-2; Ex. D at 14:13-15. She attempted to seduce Adam by buying him alcohol despite knowing that he had a drinking problem, ensuring that alcohol was always available to Adam at her residence. Adam Dep. at 155:6-20. And even when Adam began drinking early in the morning, Dr. Jane continued supplying him with alcohol until it was time to sleep. *Id*. Dr. Jane also drugged Adam, slipping Ayahuasca into his tea without his knowledge or consent, and allowed him to take cocaine at her residence. *Id.* at 37:22-25; 38:1-6; 178:25; 179:1-6. Throughout this time period, when Adam was too impaired from drugs and alcohol to consent to sex, and even "once or twice" when Adam clearly objected to sex, Dr. Jane forced Adam to have sex with her. *Id.* at 122:1-5; 135:10-14. In particular, Dr. Jane made Adam engage in oral and anal sex when he did not want to. *Id.* at 135:2-8. All of these acts run the gamut of intentional torts, from assault and battery to poisoning, that squarely fall under the exception outlined above.

Though Plaintiffs make the conclusory statement that they have a breach of fiduciary duty claim (Count 4), this claim is based entirely on the above battery claims. With their fiduciary duty claim, Plaintiffs do little more than relabel the other intentional tort claims they have already asserted, so this claim is also barred by the intentional tort exception. *See Dolan v. United States*, No. CIV. 05-3062-CL,